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Introduction

Indian tribes in the United States do not have criminal jurisdiction over non-Indians. This jurisdictional limitation on Indian sovereignty is a serious problem for Indian tribes because they cannot enforce their criminal laws against non-Indians who commit crimes on Indian reservations. This article proposes and assesses forfeiture as a method of law enforcement for Indian tribes and concludes that enacting and enforcing forfeiture provisions would broaden the limited array of law enforcement tools available to Indian tribes. By using in rem forfeiture, a civil proceeding, tribes would avoid the problem of asserting criminal jurisdiction over non-Indians while maintaining a practical method of law enforcement.

I. The Problem of Law Enforcement on Reservations

Indian tribes occupy a unique position in the American legal system. On one hand, the United States recognizes that Indian tribes are sovereign entities and the United States Congress has found that "there is a government-to-government relationship between the United States and each Indian tribe."[1] On the other hand, Indian tribes do not retain the full complement of powers and liberties attendant to sovereignty. Congress has plenary power over the Indian tribes and Congress can delegate or restrict the incidents of sovereignty that the tribes may exercise. Indian tribes, therefore, are known as "domestic dependent nations"[2] in Anglo-American law.

Congress has exercised its plenary power and limited Indian sovereignty over criminal acts through passage of legislation such as the Major Crimes Act[3] and the Indian Civil Rights Act (ICRA).[4] The Major Crimes Act

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1. 25 U.S.C. § 3601(1) (1994).
2. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
3. 18 U.S.C. § 1153 (1994).
4. 25 U.S.C. § 1302 (1994).

mandates exclusive federal jurisdiction over several "major" crimes[5] when the crime is perpetrated by an Indian in Indian country. The ICRA limits the punishment that Indian tribal courts can impose on Indians who commit crimes to a one-year imprisonment, a fine of $5000, or both.[6]

The Supreme Court also has limited Indian sovereignty within Indian country. In 1978, the Supreme Court held that criminal jurisdiction over non-Indians is inconsistent with the Indians' status as domestic dependent nations in *Oliphant v Suquamish Indian Tribe.*[7] The Court decided that Indians gave up a measure of their sovereignty when they "submitt[ed] to the overriding sovereignty of the United States . . . ."[8] The cumulative effect of *Oliphant* and these congressional acts has left a void in law enforcement on Indian reservations. "Statutory and decisional laws have truly made Indian reservations 'havens' for criminal offenders."[9]

The National Congress of American Indians stated in a May 15, 1978, letter to the President of the United States that the *Oliphant* decision "gives non-Indians an open invitation to go onto the reservation and do anything they please without fear of arrest or judicial reprisal."[10] Professor David Wachtel succinctly described the problem:

> Neither state nor federal courts are empowered to enforce tribal ordinances. Thus, if tribal courts cannot exercise jurisdiction over a non-Indian offender, in many instances, he or she will be immune from prosecution. In this case, the sole remedy of the tribe will be to remove the offender from the reservation-a measure which has not been demonstrated to have any significant deterrent effect.[11]

Professor Wachtel's and the National Congress of Indians' concern is not merely academic; it is a real problem for Indian tribes. Non-Indians increasingly traverse onto Indian reservations. Expanding tribal economies and increased population near reservations continue to bring many non-Indians into daily contact with Indians and their reservations. In 1986, for example, more than 80,000 travellers crossed the Salt River Pima Maricopa Indian

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5. The crimes that Congress currently considers "major" include murder, manslaughter, kidnapping, maiming, rape and related offenses, incest, several types of assault, arson, burglary, and robbery. 18 U.S.C. § 1153 (1994).

6. 25 U.S.C. § 1302 (1994).

7. 435 U.S. 191 (1978).

8. *Id.* at 210.

9. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., JUSTICE IN INDIAN COUNTRY 71 (1980) [hereinafter JUSTICE IN INDIAN COUNTRY].

10. David Wachtel, *Indian Law Enforcement, in* INDIANS AND CRIMINAL JUSTICE 109 (Laurence French ed., 1982).

11. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., MANUAL OF INDIAN LAW at D-4 (Mary Beth West ed., 1976) [hereinafter MANUAL OF INDIAN LAW].

Reservation every day on their way to Scottsdale, Tempe, and other Arizona cities.[12] Many tourists also entered the reservation to go boating on the Salt River. This tribe faces problems that are common to many communities in metropolitan locations, such as drug trafficking, littering, and skinny dipping.[13] Due to the unique status of Indians in the Anglo-American legal system, the tribe does not possess the power to punish the non-Indians who violate the tribe's laws. Congress held hearings on delegating jurisdiction to the tribes when non-Indians commit misdemeanor crimes on the reservation,[14] but ultimately decided not to take action.

During 1994, roughly 140,000 non-Indians visited the Mashantucket Pequot reservation in Connecticut each week. The Pequots operate the Foxwood Casino and employ 8350 employees, almost all of whom are non-Indians, and none of whom are covered by state or federal labor laws.[15] The tribe has its own court system, its own eighteen-member police force, and its own jail system.[16] What they do not have is criminal jurisdiction over non-Indians. The challenge for the Pequots and for all tribes is to strengthen their "authority, independence, and sovereignty"[17] by making and enforcing civil laws.

The circumstances that exist on the Salt River Pima-Maricopa and the Mashantucket Pequot Reservations are not unique. In fact, they are endemic to reservations across the United States. Two of the greatest sustainable resources currently available to tribes in their struggle to gain economic independence are tourism and gambling, and both require the tribes to admit large numbers of non-Indians onto the reservation. A dilemma arises because non-Indians have a degree of immunity while on the reservation. The tribe is powerless to prosecute non-Indian lawbreakers, and the state and federal governments are averse to funding law enforcement for a "separate segment" of society.

American Indian tribes must establish an effective method of administering justice and enforcing tribal law without exercising criminal jurisdiction over non-Indians. Tribes must develop justice systems to deal with a range of

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12. *Administration of Justice Within the Salt River Pima-Maricopa Indian Reservation: Hearing on S. 2564 Before the Select Committee on Indian Affairs*, 99th Cong., 2d Sess. 8 (1986) [hereinafter *Hearing on S. 2564*] (statement of Hazel Elbert, Deputy Assistant Secretary for Indian Affairs, Tribal Operations, Department of Interior).

13. *Id.*

14. *Id.*

15. Kirk Johnson, *Pequot Indians' Casino Wealth Extends the Reach of Tribal Law*, N.Y. TIMES, May 22, 1994, at A1. For a discussion of the applicability of labor laws to Indian tribes, see Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994).

16. Johnson, *supra* note 15, at A1.

17. *Id.*

problems far broader than problems such as "litter" and "skinny dipping."[18] The Department of Interior's Inspector General has warned that the influx of money and outside management from gaming operations leaves tribes especially vulnerable to organized criminal activity.[19] Indeed, some Indian casinos have failed in the midst of allegations of money-skimming, mob infiltration, bribery, and murder.[20]

This article proposes and assesses one possible weapon in the Indians' limited law enforcement arsenal. Civil forfeiture provisions modelled after the federal code would be effective, legitimate, and useful tools in the struggle to maintain law, order, and public safety on reservations. The federal government has a broad array of civil forfeiture provisions available to assist it in its law enforcement efforts. In 1989, the federal government seized and forfeited over $600 million worth of assets, including currency, planes, boats, and cattle. The state and federal governments, working together, have seized more than $1 billion from drug-related offenders alone.[21] The federal statutes tackle topics as broad as criminal enterprises involved in drug trafficking, money laundering, and organized crime,[22] and as narrow as confiscation of illegal roulette wheels.[23]

In rem forfeiture is an effective method of law enforcement. It is a *civil* proceeding and, therefore, available to tribes. Tribes could forfeit the instrumentalities and proceeds of many types of crime, including but not limited to, gambling, drugs, environmental crime, and everyday civil violations. Tribes also could enforce the regulations that protect the nature and character of their reservations. For instance, tribes generally have only one method of enforcing tribal hunting and fishing regulations against non-Indians: they have the right to exclude them from the reservation. Forfeiture provisions would allow the tribe to seize and forfeit the property that is used to violate hunting and fishing regulations. Forfeiture is a method of enforcement that could be modelled after federal law and those laws that are "typically used by states in enforcing fish and wildlife regulations."[24]

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18. *Hearing on S. 2564*, *supra* note 12, at 8.

19. *Report Urges Controls on Indian Gaming Industry*, N.Y. TIMES, Dec. 19, 1993, at A37.

20. Paul Lieberman, *Lady Luck Turns on Indians*, L.A. TIMES, Oct. 6, 1991, at A1.

21. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1327 (1991).

22. *See* Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1994); *see also* CRIMINAL DIV., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS (2d ed. 1988).

23. *See* 15 U.S.C. §§ 1171-1172, 1173(a)(3), 1177 (1994).

24. Veronica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indians: South Dakota v. Bourland*, 27 CREIGHTON L. REV. 605, 653 (1994).

Modelling tribal forfeiture laws after the federal laws is especially interesting and important because tribal forfeiture laws would appeal both to self-determinationists and to assimilationists. Self-determinationists seek to foster tribal sovereignty. Enacting and enforcing tribal forfeiture laws would enhance Indian sovereignty, strengthen the powers of tribal governments, and increase the importance of tribal justice systems — all of which are goals of Indian tribes, Congress, and the federal government[25] — and would develop simultaneously an effective method of law enforcement. Assimilationists encourage Indian tribes to adopt the federal government's institutions. Modelling tribal forfeiture laws after federal forfeiture laws would allow Indian tribes to utilize the Anglo-American institution for their own purposes.

This combination is particularly intriguing because forfeiture is an institution that suffers from as much criticism as it enjoys praise. Forfeiture effectively turns the phrase "innocent until proven guilty" on its head; it forces people to prove their innocence or be deprived of their property. Tribes who adopt forfeiture provisions would put the assimilationists' feet to the fire of the federal code. By adopting the Anglo-American legal institution of civil forfeiture for their own purposes, the Indian tribes would tell the assimilationists, "Be careful what you ask for — you just might get it."

II. A Primer on Forfeiture

A. The Basics

In rem forfeiture is a legal process whereby the sovereign brings a civil action to acquire property that is connected to a crime, employed in a manner that is proscribed by the sovereign, or is of a certain nature, regardless of its use.[26] The theory underlying and supporting in rem forfeiture is a legal fiction that allows state and federal courts to obtain jurisdiction over property in circumstances where the courts might otherwise lack jurisdiction over the owner.[27] "In rem forfeiture, that is, forfeiture of the thing, grew from the ancient notion that an instrument of harm is itself culpable, and must provide expiation for the injury."[28] A conviction is not a prerequisite to a forfeiture

25. *See, e.g.*, 25 U.S.C. § 3601 (1994). *See infra* part IV.B.2 (discussing the Indian Tribal Justice Act).

26. *See, e.g.*, 21 U.S.C. § 881 (1994). For an extensive discussion of the history of forfeiture in American law, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and see also Austin v. United States, 113 S. Ct. 2801 (1993).

27. *See e.g.*, Austin v. United States, 509 U.S. 602 (1993).

28. United States v. 38 Whalers Cove Drive, 747 F. Supp. 173, 177 (E.D.N.Y. 1990) (citing OLIVER W. HOLMES, THE COMMON LAW ch. 1 (1881) and *Exodus* 21:28); *see also* United States v. United States Coin & Currency, 401 U.S. 715, 719 (1971) ("Traditionally forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing."); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); J.W. Goldsmith, Jr.-Grant Co. v. United States, 253 U.S. 505, 511 (1921).

proceeding because the guilt or innocence of the "owner" of the property is immaterial.[29] In rem forfeiture law allows the sovereign to forfeit property, even if the sovereign has not defined the relevant activity as "criminal."[30] Forfeiture is often an alternative to the criminal justice system, and it may be used as a method of regulatory enforcement.[31]

In a civil forfeiture proceeding, the government seizes property and brings an action to perfect the government's title to the forfeited property.[32] The property already belongs to the government because title to the property vests in the government at the time of the unlawful act,[33] under the legal fiction of the "relation back doctrine."[34] In *United States v. Stowell*, the Supreme Court stated:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in connection with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the

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> The history of forfeiture dates to biblical times. In Exodus it is written: "If an ox gore a man or woman and they die, then the ox shall be stoned and his flesh not eaten; but the owner of the ox shall be quit [freed of further obligation]." (Exod. 21:28.) This is a perfect forfeiture. The ox violated the law and the owner's guilt can not be proven. Therefore, the ox is taken, and the owner is denied the right to eat ox steaks, thereby losing his property right entirely.

Michael F. Zeldin & Robert C. Weiner, *Innocent Third Parties and Their Rights in Federal Forfeiture Proceedings*, 28 AM. CRIM. L. REV. 843, 843 (1991).

29. *See Calero-Toledo*, 416 U.S. at 683 ("[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."); *The Palmyra*, 25 U.S. (12 Wheat.) at 6 ("[T]he practice has been, and so this Court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam."); *see also* David J. Taube, *Civil Forfeiture*, 30 AM. CRIM. L. REV. 1025, 1026 (1993). *But see* United States v. Ursery, 116 S. Ct. 2135, 2151 (1993) (Kennedy, J., concurring) ("Distinguishing between in rem and in personam punishments does not depend upon, or revive, the fiction . . . that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and receives the stigma of forfeiture, not the property." (citations omitted)).

The Supreme Court has reserved ruling on the issue whether the government may forfeit the property of a truly innocent owner. *Austin*, 509 U.S. at 618.

30. Cheh, *supra* note 21, at 1339.

31. *Id.* at 1340 & n.75 (citing David Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 381 (1988)).

32. *See generally* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE: LAW, PRACTICE, AND POLICY (1989).

33. United States v. Stowell, 133 U.S. 1 (1890).

34. For examples of federal codification of the relation back doctrine, see 18 U.S.C. § 981(f) (1994) and 21 U.S.C. § 881(h) (1994).

> offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.[35]

There are three basic categories of forfeiture: "contraband," "instrumentalities," and "proceeds."[36] Contraband is property that is itself "guilty" because the sovereign has prohibited its importation, exportation, or possession.[37] One method the federal government uses to enforce custom and import laws is to forfeit contraband.[38] Instrumentalities include property "connected" to illicit activity. Instrumentalities may be used, for example, in producing, storing, transporting, or distributing contraband.[39] Proceeds from illegal activity are also subject to forfeiture. "This category includes the profit from a business fraudulently obtained, as well as any enterprise or goods in which money from criminal activities has been invested."[40]

The fact that the proceeding is an in rem civil proceeding significantly affects the rights and defenses available to a claimant to the property.[41] The full range of constitutional protections available in a criminal prosecution does not necessarily apply in a civil action, such as a civil forfeiture.[42] The United States Constitution distinguishes between civil and criminal cases, and the

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35. *Stowell*, 133 U.S. at 16-17.

36. The discussion of categories and rationales for forfeiture is taken from Cheh, *supra* note 21, at 1340-42.

37. *See* Cooper v. City of Greenwood, 904 F.2d 302, 304 (5th Cir. 1990) ("Contraband *per se* consists of objects which are 'intrinsically illegal in character,' 'the possession of which, without more, constitutes a crime.'" (citations omitted)). Because it is not subject to legal possession, there is no "property right" in contraband. *Cooper*, 904 F.2d at 305. "Derivative contraband" includes items that "become unlawful because of the use to which they are put." *Id.*

38. *See* 19 U.S.C. §§ 1595a, 1703 (1994); 21 U.S.C. § 881 (1994); 49 U.S.C. §§ 781-784 (1994).

39. Congress has even enacted provisions that permit forfeiture of leasehold interests as instrumentalities in narcotics crimes. *See* 21 U.S.C. § 881(a)(7) (1994) (as amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181).

40. Cheh, *supra* note 21, at 1341 (citing 18 U.S.C. § 1963 (1994); 21 U.S.C. § 853 (1994)).

41. *See generally* Cheh, *supra* note 21; J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

42. Taube, *supra* note 29, at 1044 & n.221. *See generally* David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 430-37 (1993). Professor Cheh believes that the reason civil forfeiture is so popular with law enforcement is because of the relaxed procedures required in an in rem forfeiture.

> Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach antisocial behavior, but also because officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel.

Cheh, *supra* note 21, at 1329.

Supreme Court recently noted this difference in *United States v. Ursery*.[43] The Fifth Amendment's proscription against self-incrimination explicitly applies to "criminal cases."[44] The Sixth Amendment guarantees to the "accused" the rights to a speedy trial, a trial by jury, confrontation of witnesses, and assistance of counsel in "all *criminal* prosecutions."[45] The Supreme Court has limited other guarantees, such as the requirement that guilt be established beyond a reasonable doubt in criminal prosecutions, even though the Constitution does not expressly limit (or grant) these rights.[46]

When enacting forfeiture laws, Congress recognized and capitalized on the importance of the distinction between civil and criminal proceedings. In a federal in rem forfeiture, the government may seize property without filing charges or obtaining a conviction, and the owner (who becomes a "claimant") is not entitled to a presumption of innocence. The government merely must establish probable cause that the seized property was associated with or involved in illicit activity.[47] Once the government has established probable cause, the claimant bears the burden to prove by a preponderance of the evidence that the property is not subject to forfeiture.[48] The claimant may do so by disproving probable cause[49] or by establishing innocent ownership of the property.[50]

B. Building the Forfeiture House on a Foundation of Legal Fictions

The most striking feature of in rem forfeiture is that the entire area of law is premised upon the legal fiction that "the thing is primarily considered the offender . . . ."[51] Anglo-American law declares that a property is itself "guilty." Forfeiture law has given rise to several other legal fictions. For instance, the relation back doctrine is a legal fiction whereby the government merely perfects its already existing title to the "thing." This type of logic —

43. 116 S. Ct. 2135 (1993). For a more complete discussion of *Ursery* and related cases, *see infra* part VIII.

44. U.S. CONST. amend. V.

45. *Id.* at amend. VI (emphasis added).

46. *See* United States v. Ward, 448 U.S. 242, 248 (1980).

47. United States v. 1987 Jeep Wrangler, 972 F.2d 472, 476 (2d Cir. 1992). For an example of a federal statute stating that the standard is probable cause, see 19 U.S.C. § 1602 (1994).

48. Taylor v. United States, 44 U.S. 197, 211 (1845) (stating that the judge determines whether there is probable cause and, if so, the burden shifts to the claimant); *e.g.*, 21 U.S.C. § 881(b)(4); Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 825 (1984).

49. United States v. Four Parcels of Real Property, 893 F.2d 1245, 1251 (11th Cir. 1990).

50. United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep, 964 F.2d 474, 476 (5th Cir. 1992).

51. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921). "[C]ivil forfeiture is a creature unto itself. It is an area of the law which is founded upon the many inherent fictions of our jurisprudence." *1987 Jeep Wrangler*, 972 F.2d at 476.

legal fiction built upon legal fiction — can lead to some shocking results. For instance, in the spirit of President Ronald Reagan's "Zero Tolerance" policy, the Coast Guard seized the *Atlantis II* — one of the nation's premier research ships, belonging to the Woods Hole Oceanographic Institution — based on the presence of marijuana residue and two pipes in the crew's quarters.[52] Legal fiction arguably should not support the weight of such a result.

On the other hand, there is a long historical tradition supporting the legal fiction that property itself may be guilty. This legal fiction is well developed in American jurisprudence through a "venerable history in our case law."[53] One might argue that history and case law should not prevent courts from requiring Congress to build in rem forfeiture law on a firmer foundation. However, it appears that the law has developed beyond that point because Congress has enacted over 100 forfeiture statutes, creating a huge body of law that exploits the legal fictions underlying forfeiture law.[54] Congress in the future may change the law, but the legal fiction that property is guilty will remain the foundation of in rem forfeitures.

In rem forfeiture rests on a legal fiction derived out of sheer judicial necessity. The Supreme Court has recognized that without in rem jurisdiction, state and federal courts in many cases would be powerless because they lack in personam jurisdiction over the owner of the guilty "thing."[55] "The fictions of in rem forfeiture were developed primarily to expand the reach of the

52. Jane Fritsch, *U.S. to Drop Drug Case Against Research Vessel*, L.A. TIMES, July 26, 1988 (government chose not to pursue forfeiture only after public outcry); *see also* United States v. One 1985 Mercedes, 917 F.2d 415 (9th Cir. 1989) (basing forfeiture of Mercedes on possession of "personal use" amount of cocaine); United States v. 5528 Belle Pond Drive, 783 F. Supp. 253 (E.D. Va. 1991) (discussing reported cases of forfeiture of large amount of property based on small amount of marijuana), *aff'd sub nom.* United States v. Campbell, 979 F.2d 849 (4th Cir. 1992).

53. Austin v. United States, 509 U.S. 602, 615 (1993) (footnote omitted).

54. Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 194 (1991). Many states have adopted civil forfeiture statutes. *See, e.g.*, CAL. FIN. CODE § 5320 (West Supp. 1995) (forfeiture of property for lending institution law violations); CAL. HEALTH & SAFETY CODE § 11470 (West 1994 & Supp. 1995) (forfeiture of property for drug law violations); N.Y. CIV. PRAC. L. & R. § 1310 (McKinney Supp. 1991) (forfeiture of proceeds and instrumentalities of crime); N.Y. PENAL LAW § 480.05 (McKinney 1994) (forfeiture of proceeds and instrumentalities of drug law violations). Concerns regarding protections for innocent citizens and abuse of forfeiture law by law enforcement agencies may have prevented the approval of a "uniform" or "model" forfeiture law. Mary Pat Flaherty, *There's No Justice Dept. At Talks On Property Seizures: Groups Feud Over Protections for Innocent Citizens*, SEATTLE TIMES, Aug. 20, 1991, at A13 (discussing drafting efforts by National Conference of Commissioners on Uniform State Laws).

55. *Austin*, 509 U.S. at 615.

courts . . . ,"[56] and the courts employ legal fictions to satisfy the jurisdictional requirements in cases utilizing in rem forfeitures.[57]

This article does not make inquiry into the propriety of the legal fictions upon which in rem forfeiture is premised. The preceding discussion simply presents the existing theory of jurisdiction in such cases. This article argues that tribal courts may exercise civil jurisdiction in civil forfeiture proceedings over property located on Indian land and should do so. The legal fictions necessary to support federal in rem forfeiture law also support the tribes' enactment and enforcement of in rem forfeiture provisions. Tribes do not possess criminal jurisdiction over non-Indians, but tribes could pursue in rem proceedings when a non-Indian claimed the "thing" (property) in question. The legal fiction that the government brings suit under a civil statute would circumvent the problem of criminal jurisdiction, because the matter is a civil proceeding. The legal fiction that the government proceeds against the property, not the person, also would circumvent the problem of tribal court jurisdiction over non-Indians, because property does not possess, by itself, a racial character. Even assuming that property could be categorized as either Indian or non-Indian, the relation back doctrine would make the property in question "tribal" property. Non-Indian owners would be mere "claimants" and the judicial proceeding would merely perfect the tribe's title to the property.

Tribal governments and courts should use the legal fiction foundation, upon which Anglo-American law has built in rem forfeiture, to extend their power in a limited sense over non-Indians. After all, the Supreme Court states that "[t]he fictions of in rem forfeiture were developed primarily to expand the reach of the courts . . . ."[58] The fact that tribal courts might utilize these fictions concurrently with the federal courts should not be cause for concern. Federal policy encourages tribes to revitalize their self-government and to develop tribal courts and justice systems. By employing legal fictions that have a long historical tradition in Anglo-American law, tribal courts would reproduce and mirror the experience of Anglo-American jurisprudence. What is good for the goose is good for the gander.

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56. Republic National Bank of Miami v. United States, 506 U.S. 80, 87 (1992). The exercise of in rem jurisdiction is necessary because it is often "the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844).

57. The use of in rem forfeiture predates the establishment of constitutional government. "Long before the adoption of the Constitution the Common Law Courts in the Colonies — and later in the States during the period of the Confederation — were exercising in rem jurisdiction in the enforcement of (English and Local) forfeiture statutes." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974).

58. *Republic National Bank of Miami*, 506 U.S. at 87.

III. Oliphant and the Civil/Criminal Jurisdictional Dichotomy in Federal Indian Law

The Supreme Court has noted that "[t]he distinction between a civil penalty and a criminal penalty is of some constitutional import."[59] Nowhere is this distinction more important than in federal Indian law.

In 1978, the Supreme Court held that Indian tribal courts, "absent affirmative delegation of such power by Congress," do not have criminal jurisdiction over non-Indians.[60] The Court did not rely on a treaty or a congressional enactment in limiting Indian sovereignty. Instead, the Court stated that such power was inconsistent with the Indians' status as domestic dependent nations.[61] The Court reasoned that Indian tribes necessarily lost some degree of sovereignty when they "submitt[ed] to the overriding sovereignty of the United States . . . ."[62] One lost incident of sovereignty was the power to try non-Indians in criminal proceedings. Justice Rehnquist's opinion in *Oliphant* went further and stated that the Indians' "limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*"[63] Read literally, Justice Rehnquist's statement would preclude Indians from exercising civil or criminal jurisdiction over non-Indians. All that would remain of Indian sovereignty would be the power to govern entirely internal matters.

Fortunately, subsequent decisions limited Justice Rehnquist's pronouncement regarding the extent of Indian sovereignty. The Supreme Court has not extended its opinion in *Oliphant* to preclude Indians from exercising civil jurisdiction over non-Indians on their reservations. In the same year that *Oliphant* was decided, the Supreme Court recognized tribal law-making institutions as competent legislatures,[64] and recognized tribal courts "as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[65] It is clear that the tribes have some power to exercise jurisdiction over non-Indians, but the Supreme Court continues to define the boundaries of that power.

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59. United States v. Ward, 448 U.S. 242, 248 (1980) (evaluating statutory fines and penalties).

60. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978).

61. *Id.* at 208.

62. *Id.* at 210. As with the statement of forfeiture law, this Article does not take issue with the state of federal Indian Law, it simply acts upon it.

63. *Id.* at 209 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (emphasis added)).

64. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).

65. *Martinez*, 436 U.S. at 65 (footnote and citation omitted); *see also* Montana v. United States, 450 U.S. 544, 566 (1981).

Congress has plenary power over Indian affairs.[66] Congress may take jurisdiction over any matter by an express reduction of Indian sovereignty, even matters involving crimes among Indians, as it did in the Major Crimes Act.[67] Alternatively, Congress may expressly delegate jurisdiction to tribes, including jurisdiction over non-Indians.[68] Where Congress neither expressly retains jurisdiction nor delegates sovereignty, the Supreme Court analyzes the character of the asserted aspect of sovereignty, as it did in *Oliphant*. "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[69]

In 1981, three years after *Oliphant*, the Supreme Court elaborated on the remaining confines of Indian sovereignty. In *Montana v. United States*,[70] the Supreme Court held that the Crow Indian Tribe had no power to regulate fishing and hunting by non-Indians on reservation land owned in fee by non-Indians.[71] The Court stated that "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[72] The Court, however, also stated that Indian tribes retain sovereign power to exercise "some forms of civil jurisdiction over non-Indians on their reservations . . . ."[73] The Court then listed two such forms: first, Indian tribes retain inherent power to exercise civil jurisdiction over non-Indians "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[74] Second, Indian tribes "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[75] The Court concluded its opinion by listing a different but related power that the tribe retained: the right of Indians to exclude non-Indians from Indian lands.[76]

The Supreme Court analysis suggested by the court in *Montana* was the subject of two recent Supreme Court decisions, *Brendale v. Confederated*

66. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

67. 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153 (1994)).

68. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975) (holding that Congress validly delegated authority to tribes to regulate the introduction of liquor into Indian country in 18 U.S.C. § 1161).

69. United Sates v. Wheeler, 435 U.S. 313, 323 (1978).

70. 450 U.S. 544 (1981).

71. *Id.* at 545.

72. *Id.* at 565.

73. *Id.*

74. *Id.* at 566 (citations omitted).

75. *Id.* at 565 (citations omitted).

76. *Id.* at 554, 558, 566-67; *see also* South Dakota v. Bourland, 508 U.S. 679, 690 (1993) (citing *Montana* for the proposition that the treaty right to "absolute and undisturbed use" encompasses the right to exclude *and* to regulate).

Tribes & Bands of Yakima Indian Nation[77] and *South Dakota v. Bourland*.[78] In both decisions, the Court — with a few modifications — relied on the *Montana* analysis. Since *Montana* remains as the vital inquiry, the next section of the article applies the *Montana* analysis to determine whether tribes have civil jurisdiction in a forfeiture proceeding. Parts V and VI discuss the two subsequent Supreme Court decisions that explicate *Montana*.

IV. Reconciling Forfeiture Law with Federal Indian Law: The Montana Analysis of Civil Jurisdiction

Reconciling forfeiture law with federal Indian law is primarily a matter of analyzing the remaining aspects of Indian sovereignty to determine whether the tribal court[79] has jurisdiction. *Oliphant* and *Montana* establish the framework for an analysis of tribal jurisdiction over non-Indians.

Montana provides that a tribe has civil jurisdiction over the activities of non-Indians in four situations: First, Congress may expressly delegate jurisdiction to the tribe. Second, if Congress has not delegated jurisdiction and has not expressly reduced tribal jurisdiction, a tribe has jurisdiction over the activities of non-Indians when the activities threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Third, absent express congressional delegation or reduction, tribes retain jurisdiction over the activities on non-Indians who enter consensual relationships with a tribe or its members. Fourth, and finally, unless Congress has diminished the power, tribes retain the right to exclude non-Indians from Indian tribal lands.

A. Does Montana Apply to Civil Forfeiture?

Before beginning this analysis it is necessary to consider whether these cases that concern jurisdiction over *non-Indians* are relevant to in rem forfeitures. If not, Indian jurisdiction over an in rem forfeiture proceeding is appropriate. The *Montana* analysis might not apply to civil forfeiture because it is an in rem proceeding. Civil forfeiture is an action against property, not against an Indian or a non-Indian. Under the relation-back doctrine, "the forfeiture takes effect immediately upon the commission of the [specified]

77. 492 U.S. 408 (1989).

78. 508 U.S. 679 (1993).

79. There are three basic types of Indian judicial systems: (1) tribal courts which are established by tribal constitution, code, or ordinance; (2) traditional or custom courts which exercise authority in accordance with longstanding oral customs; and (3) Code of Federal Regulations (CFR) courts which are established pursuant to provisions of the Code of Federal Regulations. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS, *in Tribal Courts Act of 1991: Hearing on S. 1732 Before the Senate Select Committee on Indian Affairs*, 102d Cong., 2d Sess. 311 (1992). Because this article discusses statutorily adopted forfeiture provisions, the discussion of tribal courts refers to the first listed type of Indian judicial system.

act . . . ."[80] The action brought by the tribe merely perfects the tribe's property interest as sovereign. The action is therefore an entirely internal tribal matter. The Supreme Court has held that tribes retain power over internal matters and the right to self government.[81] One federal court has written that "[t]he regulation of tribal property would seem to be one of the vestiges of tribal sovereignty and thus a matter of self government."[82]

The legal fiction of a "guilty" property — unrelated to the owner's innocence — would satisfy even Justice Rehnquist's broad statement in *Oliphant v. Suquamish Indian Tribe*[83] that by submitting to the sovereignty of the United States, the Indians gave up "the right of governing every person within their limit except themselves."[84] Tribal jurisdiction in such cases would extend only to property. The exercise of jurisdiction over property does not approach the governance of non-Indian people that so concerned the *Oliphant* Court. Furthermore, it is consistent with the Indians' "dependent status."

Congress has recognized and heightened the importance of distinguishing between jurisdiction over a person and jurisdiction over property. In enacting the ICRA,[85] Congress guaranteed certain rights to all parties who appear before tribal courts. These rights are similar to the rights in the Bill of Rights. Congress chose, however, to provide for federal review of ICRA violations only in habeas corpus cases; cases in which the petitioner rather than the property is being held in custody.[86] Consequently, "[t]hat means that tribal courts are the sole arbiters of their own governmental actions when 'mere' property rights of non-Indians are involved."[87] Congress has given Indian tribes greater power over cases dealing with property.

The Supreme Court recognized the importance of distinguishing between in personam jurisdiction and in rem jurisdiction in a recent case. In *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,[88] the Court upheld a state ad valorem property tax on land that was within the Yakima Indian Reservation and owned by reservation Indians. The Court stated that "[w]hile the *in personam* jurisdiction over reservation Indians at

80. United States v. Stowell, 133 U.S. 1, 16-17 (1889).

81. United States v. Wheeler, 435 U.S. 313 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

82. Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338, 1341 (D.S.D. 1975).

83. 435 U.S. 191 (1978).

84. *Id.* at 209 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810)).

85. 25 U.S.C. §§ 1301-1312 (1994).

86. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

87. Veronica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indians: South Dakota v. Bourland*, 27 CREIGHTON L. REV. 605, 650 (1994) (citing *Martinez*, 436 U.S. at 69-70, 72); *see also* FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 668 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN 1982 ED.] (stating that ICRA limits federal court review to petitions for writs of habeas corpus).

88. 502 U.S. 251 (1992).

issue in *Moe* [*v. Confederated Salish & Kootenai Tribes*[89]] would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not."[90] If a state's exercise of in rem jurisdiction does not disrupt tribal self-government because it affects the property alone, then the tribal exercise of in rem jurisdiction within the boundaries of the reservation should not infringe on state or federal sovereignty. This exercise of tribal sovereignty will not result in "unwarranted intrusions" on non-Indians' personal liberty in contravention of basic principles of Anglo-American justice — like the Bill of Rights — that the Court feared in *Oliphant*.[91]

The fact that in rem proceedings are based on a legal fiction should not raise substantial concerns. The Supreme Court has long recognized that in rem forfeiture was created out of necessity to expand the jurisdiction of federal courts.[92] For example, in rem procedures are particularly useful and in fact necessary to admiralty proceedings in which courts might otherwise lack in personam jurisdiction over the owner of the property.[93] Similarly, the use of in rem procedures by tribes would expand the reach of tribal courts and allow tribes to exert some control over non-Indians in civil matters. Both federal and tribal courts would obtain jurisdiction over matters in which they otherwise "might have lacked in personam jurisdiction over the owner of the property."[94] More importantly, this exercise of civil jurisdiction would not violate *Oliphant* because the tribes would not be exercising criminal jurisdiction over non-Indians.

B. Congressional Action

There are over 100 federal statutes containing forfeiture provisions. The express language of the statutes neither delegates to tribes the authority to enact their own forfeiture laws nor precludes them from enacting their own forfeiture laws. This part of the article examines various congressional actions that could be construed as delegating or precluding tribal jurisdiction.

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89. 425 U.S. 463 (1976).

90. *County of Yakima*, 502 U.S. at 265; *see also* United States v. Ursery, 116 S. Ct. 2135, 2140 (1996) (citing Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931)) (noting the "sharp distinction between in rem civil forfeitures and in personam civil penalties such as fines: Though the latter could, in some circumstances, be punitive, the former could not").

91. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian Tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

92. Republic National Bank of Miami v. United States, 506 U.S. 80, 87 (1992).

93. Austin v. United States, 509 U.S. 602, 616 n.9 (1993) (citing United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844)).

94. *Id.* at 2808.

1. Congressional Action Precluding Tribal Jurisdiction

A number of federal forfeiture statutes take effect upon the occurrence of illegal activity on Indian country.[95] For example, federal law provides for the forfeiture to the United States of any fish and wildlife taken in violation of tribal ordinances, and for the forfeiture of the vehicles and/or equipment used to take the fish or wildlife.[96] The Secretary may authorize tribal personnel to enforce these provisions.[97] The enactment of federal laws like these should not preclude tribes from enacting civil forfeiture laws in other areas because jurisdiction over the activities of non-Indians is a vital part of tribal sovereignty and Congress "has never expressed any intent to limit the civil jurisdiction of the tribal courts."[98] In fact, state forfeiture laws coexist with federal forfeiture laws in the same way that tribal forfeiture laws might coexist with federal forfeiture laws.[99]

Because state and federal forfeiture laws coexist, the Supreme Court has had to establish a rule of priority in the exercise of in rem jurisdiction. When two courts, one state and one federal, each claim in rem jurisdiction over the same *res*, "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."[100] Tribal courts, therefore, should have in rem jurisdiction over property located within a reservation to the exclusion of a state court and a federal court[101] when there is no preempting federal law. Even when there is a federal statute, it is possible that the tribe may retain in rem jurisdiction unless the federal government acts.[102] In some cases, the government may choose not to act in hopes or with the understanding that tribes will act.

One potential limit on the exercise of tribal sovereignty is the ICRA.[103]

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95. *See* 25 U.S.C. § 264 (1994). That statute is discussed in U.S. *ex rel.* Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978, 981 (10th Cir. 1978).

96. 16 U.S.C. §§ 3371-3378 (1994); *see also* Johnson Act, 15 U.S.C. §§ 1171-1178 (1994) (regulating gaming-related machinery and technology). The Act authorizes seizure and forfeiture in Indian country. *Id.* § 1177.

97. 16 U.S.C. § 3375(a)-(b) (1994).

98. Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 17 (1987).

99. For example, 16 U.S.C. § 3374(a)(2) (1994) authorizes forfeiture of fish or wildlife taken in violation of state law. This does not preclude states from adopting their own forfeiture laws.

100. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935); *see also* United States v. $79,123.49, 830 F.2d 94, 96 (7th Cir. 1987). For a discussion of federal judicial oversight of the tribal courts and the doctrine of abstention, see *infra* part VIII.A.

101. The tribal court, in such case, should even be able to enjoin proceedings in the other courts if it was the first court to assume jurisdiction over the *res*. *See* Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939); *$79,123.49*, 830 F.2d at 97 n.3.

102. *See, e.g.*, United States v. Blackfeet Tribe of the Blackfeet Indian Reservation, 364 F. Supp. 192, 195 (D. Mont. 1973) (stating that whatever in rem jurisdiction the tribe may have had over the mechanical gambling devices found on the reservation prior to seizure by the federal government, ceased to exist after the seizure); MANUAL OF INDIAN LAW, *supra* note 11, at D-4.

103. 25 U.S.C. §§ 1301-1341 (1994). For a general discussion of the ICRA, see DAVID H.

The ICRA guarantees certain rights to all parties, Indians and non-Indians, who appear before tribal courts. The provisions of the ICRA mirror some, but not all, of the constitutional restraints on the states and the federal government.[104] One provision of the ICRA appears particularly limiting. Title 25 U.S.C. § 1302(7) limits tribal jurisdiction to maximum sentences of one year in prison or a $5000 fine. The text of this provision, however, limits its application to criminal offenses:

> No Indian tribe in exercising powers of self-government shall- . . . . (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for *conviction of any offense* any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both . . . .[105]

The unique nature of *civil* forfeiture should allow tribal courts to retain jurisdiction.

The other provisions of the ICRA, the requirement of due process[106] for example, do not preclude tribal jurisdiction. At most, this section of the ICRA simply governs tribal courts' exercise of jurisdiction in the same manner that the U.S. Constitution restricts federal forfeitures.[107] The statutory and common law experience of Anglo-America provides a developed model that will assist the creation and enforcement of tribal forfeiture laws.

2. Congressional Delegation of Jurisdiction

Just as Congress has not prohibited Indian tribes' enactment of civil forfeiture provisions, Congress has not delegated to Indian tribes the specific power to adopt civil forfeiture provisions. A specific delegation is not necessary, however, for two reasons. First, Congress may believe that tribes already possess the power to enact and enforce forfeiture provisions. Second, Congress has expressed an affirmation of tribal court power over civil matters that is so general that it should include this lesser, specific power.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[108] the Court cited the Indian Reorganization Act (IRA) as a statute in which Congress recognized an extension of tribal sovereignty over non-

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GETCHES ET AL., FEDERAL INDIAN LAW 499-503 (3d ed. 1993).

104. GETCHES ET AL., *supra* note 103, at 499.

105. 25 U.S.C. § 1302(7) (1994) (emphasis added).

106. *Id.* § 1302(8).

107. *See infra* part VIII.B (discussing the interaction between the constitutional limits on forfeiture and the limits imposed by the ICRA). David Getches, Charles Wilkinson, and Robert Williams argue that the ICRA may be less restrictive than the Constitution — the ICRA may not incorporate all federal case law under the similarly worded constitutional provisions. GETCHES ET AL., *supra* note 103, at 501.

108. 447 U.S. 134 (1980).

Indians. The Court upheld a tribe's imposition of taxes on cigarettes purchased by non-Indians. The Court wrote that the power to tax transactions that occur on trust lands and significantly affect a tribe or its members "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[109] The Court found that neither federal law nor the tribes' dependent status divested Indian taxing power.

> [A]uthority to tax the activities *or property* of non-Indians taking place *or situated* on Indian lands, in cases where the tribe has a significant interest in the subject matter, *was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476.* In these respects the present cases differ sharply from Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians.[110]

If the tribes already possess the power, then Congress would not need to delegate power in civil matters. Section 16 of the IRA is an example of a tribal power *confirmed* by Congress, not an instance of congressional delegation of power. Thus, an examination of jurisdiction in tribal forfeitures necessitates an examination of Congress's understanding of tribal powers.

The Supreme Court has "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government."[111] The Court has cited several federal statutes that are intended to effectuate this policy.[112] The Court has also noted the congressional policy of encouraging the development of tribal courts.[113] "Not satisfied solely with centralized government of Indians, [Congress] encouraged tribal governments and courts

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109. *Id.* at 152.

110. *Id.* at 153 (emphases added).

111. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (citing Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 & n.10 (1980); Williams v. Lee, 358 U.S. 217, 220-21 (1959)).

112. In *Iowa Mutual*, the court cited provisions from the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(a) (1994), the Indian Reorganization Act, 25 U.S.C. §§ 476-479 (1994), and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1994). *Iowa Mutual*, 480 U.S. at 14 n.5. The Court has noted that § 16 of the IRA, 25 U.S.C. § 476, is "a statute specifically intended to encourage Indian tribes to revitalize their self-government." Fisher v. District Court, 424 U.S. 382, 383 (1976) (per curiam).

113. *Iowa Mutual*, 480 U.S. at 14-15 & n.6 ("For example, Title II of the Indian Civil Rights Act provides 'for the establishing of educational classes for the training of judges of courts of Indian offenses.'" (quoting 25 U.S.C. § 1311(4))).

to become stronger and more highly organized."[114] In 1993, Congress enacted the Indian Tribal Justice Act[115] which seeks to assist and encourage the development of tribal justice systems in general, and tribal courts in particular.

An analysis of the propriety of forfeiture provisions must begin with the presumption that the exercise of tribal jurisdiction is appropriate on Indian land located within a reservation. Congress proceeds upon this assumption as evidenced in the Indian Tribal Justice Act.

In 1987, the Supreme Court stated: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities *presumptively lies in the tribal courts* unless affirmatively limited by a specific treaty provision or federal statute."[116] In the legislative history accompanying the Indian Tribal Justice Act, Congress cites this Supreme Court language affirmatively and also states:

> As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.[117]

Not only did Congress recount the current state of the law (that an important and vital aspect of tribal sovereignty is authority over the activities of non-Indians in Indian country),[118] Congress also made specific findings regarding the extent of tribal jurisdiction and included them in the Indian Tribal Justice Act.

> The Congress finds and declares that —
>
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
>
> *(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights*;

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114. *Williams*, 358 U.S. at 220 (citations omitted).

115. Pub.L. No. 103-176, 107 Stat. 2004 (codified as amended at 25 U.S.C. § 3601 (1994)).

116. *Iowa Mutual*, 480 U.S. at 19 (citations omitted) (emphasis added).

117. H.R. REP. NO. 205, 103d Cong., 1st Sess. 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2425.

118. *Iowa Mutual*, 480 U.S. at 19; *see* Montana v. United States, 450 U.S. 544, 565-66 (1981); Fisher v. District Court, 424 U.S. 382, 387-89 (1976) (per curiam); COHEN 1982 ED., *supra* note 87, at 359 ("Tribal self-government requires that tribal authority over Indian property on a reservation must be exclusive of state authority."). Tribal courts are, furthermore, the "appropriate forums for the exclusive adjudication of disputes affecting important personal and *property interests* of both Indians and *non-Indians*." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978). (emphasis added).

> (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act . . . .[119]

The Report to accompany Senate Bill 521, explained that:

> Finding (5) was added to reflect the decision of the United States Supreme Court in the case of *Montana v. United States*, 450 U.S. 544 (1981), with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.
>
> Finding (6) was added to emphasize that *tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals.* The language tracks similar language of the Supreme Court in its ruling in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), where the Court stated that "tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians, Id. at 65."[120]

In making these findings, Congress either delegated broad general power over civil matters to the tribes or, more likely, Congress explicitly confirmed its belief that civil jurisdiction over the activities of non-Indians *presumptively lies in the tribal courts.* Thus, although the Supreme Court has perverted the presumption that civil jurisdiction remains with the tribal courts into a presumption that tribal courts do not have jurisdiction over non-Indians,[121] Congress's actions dictate that federal courts must presume that the tribes possess jurisdiction in civil matters.

In enacting the Indian Tribal Justice Act, Congress made specific findings that memorialize a line of Supreme Court decisions that *presume* that tribes retain civil jurisdiction over persons and property within the reservation. Congress's findings require the federal courts to reexamine assertions of tribal jurisdiction — such as the one proposed in this article — against a presumption in favor of tribal jurisdiction and to reject the Supreme Court's

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119. 25 U.S.C. § 3601 (1994) (emphasis added).

120. S. REP. NO. 88, 103d Cong., 1st Sess. 8 (1993) (explanation of Committee Amendments to the Tribal Justice Systems Act) (emphasis added).

121. South Dakota v. Bourland, 508 U.S. 679, 690-91 (1993). For a discussion of how the Court's decisions have perverted this presumption, see Justice Blackmun's opinion in Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 448-68 (1989) (Blackmun, J., concurring in part & dissenting in part).

narrow vision of tribal power; to do so is to honor Congress's intentions and assumptions. Given a choice between honoring the Supreme Court's vision of tribal sovereignty and Congress's vision of tribal sovereignty, federal courts must accept the vision of the elected legislature, not the judicial legislature.

This presumption in favor of civil jurisdiction, along with Congress's general policy of approving and encouraging the strengthening of tribal government, weighs heavily in favor of tribal jurisdiction in forfeitures. When tribal actions mirror the federal government's actions, a stronger presumption should exist that such acts are proper, and a federal court should affirm a tribal court's exercise of jurisdiction. Congress has indicated a clear intention that tribal courts presumptively have jurisdiction over activities of Indians and non-Indians occurring on the reservation, and civil proceedings are sufficiently distinct from criminal proceedings. If Congress believes this exercise of tribal jurisdiction is excessive, then Congress may use its plenary power and preclude the tribe from exerting jurisdiction. Federal courts should not act as the administrators or watchdogs of tribal justice in the area of forfeiture. The proper inference that federal courts should draw from the federal government's silence is that tribal sovereignty remains intact.[122] The remedy for any such abuse lies with Congress.[123] As one court stated:

> The court recognizes that its conclusion — namely, that it is without jurisdiction to hear reservation-based tort claims such as Superior's — will relegate non-Indian plaintiffs like Superior to what they may perceive as a hostile forum. This court cannot presume, however, that non-Indians will receive less than impartial justice from tribal courts. If it appears that tribal courts are abusing their exclusive jurisdiction in these matters, the remedy is with Congress, which has already taken steps to ensure that tribal courts comport with accepted notions of due process

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122. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982); *see also Iowa Mutual*, 480 U.S. at 18. The Department of Justice also proceeds upon the presumption that Indian tribes have jurisdiction over both Indians and non-Indians.

> Tribal courts are essential mechanisms for resolving civil disputes that arise on the reservation or otherwise affect the interests of the tribe or its members. In the absence of a contrary treaty or statutory provision, tribal courts are presumed to have jurisdiction over such civil litigation, including actions involving non-Indians. The integrity of and respect for tribal courts are critical for encouraging economic development and investment on the reservations by Indians and non-Indians alike.

Janet Reno, *A Federal Commitment to Tribal Justice Systems*, JUDICATURE, Nov.-Dec. 1995, at 114 (footnote omitted).

123. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it." Williams v. Lee, 358 U.S. 217, 223 (1958) (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 564-66 (1903)).

and equal protection by enacting the Indian Civil Rights Act, §202(8), 25 U.S.C. § 1302(8) (1982).[124]

3. Delegation/Retention of "Sovereignty"

One problem remains with tribal jurisdiction over in rem forfeitures. One might argue that the federal government is the real "sovereign" in such a civil forfeiture proceeding, because Congress has plenary power over Indians and the Indians possess only those incidents of sovereignty that Congress has carved out from the federal government's bundle of powers. Any forfeiture action would perfect the *federal government's* title in the property.[125]

One response to this argument is that Congress either delegated power to the Indians to act as "sovereign" or confirmed an already existing power.[126] The Tribal Justice System Act states that "there is a government-to-government relationship between the United States and each Indian tribe . . . ."[127] A "government-to-government relationship" implies that Indians are a separate sovereign. Congress has made clear that tribes are not simply the neglected stepchild of the federal government, but instead are independent governments: "Nothing in this chapter shall be construed to . . . imply that any tribal justice system is an instrumentality of the United States."[128] If Congress delegated a measure of its sovereign status, then the delegation could include the power to perfect Indian title through tribal proceedings.[129] If Congress simply confirmed power the tribes had under existing law as separate sovereigns, then the existing power would include power to perfect Indian title.

One Supreme Court case has held that Indian tribes are in fact a separate sovereign. In *United States v. Wheeler*,[130] Anthony Wheeler pleaded guilty in tribal court to contributing to the delinquency of a minor, a misdemeanor. Wheeler was later indicted in federal court on a charge of rape for the same acts.[131] Wheeler challenged the federal prosecution claiming that the tribal government and the federal government were the same sovereign and that a second prosecution would, therefore, violate the Double Jeopardy Clause of the Fifth Amendment.

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124. Superior Oil Co. v. Merritt, 619 F. Supp. 526, 534 (D. Utah 1985).

125. *See supra* notes 32-35 and accompanying text.

126. *See supra* part IV.B.2.

127. 25 U.S.C. § 3601(1) (1994).

128. *Id.* § 3601(5).

129. Tribes retain the power to acquire land by purchase in the tribal name, but the purchase must be approved by the federal government. COHEN 1982 ED., *supra* note 87, at 482. The Cherokee Reservation in North Carolina, the Sac and Fox Reservation in Iowa, the Choctaw Reservation in Mississippi, and several small Sioux communities in Minnesota were all acquired by purchase of aboriginal homelands after removal. *Id.* at 482-83.

130. 435 U.S. 313 (1978).

131. *Id.* at 314-17.

The Supreme Court held that the tribal court had power to prosecute Wheeler and that the source of the tribe's criminal jurisdiction over its own members was the tribe's inherent sovereignty, not as a result of a delegation by the federal government.[132] For purposes of assessing tribal forfeiture provisions, a tribe may be a separate sovereign. There are, however, two problems with extending the *Wheeler* decision. First, *Wheeler* involved Indian sovereignty over the tribe's own members. Second, the Court noted that Indian tribes had lost the aspects of sovereignty that had been divested "by implication as a necessary result of their dependent status"[133] as well as the aspects that Congress had explicitly withdrawn.

The Court noted that "the areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[134] The Court might limit Indian tribes' status as "sovereign" to cases involving tribal members. On the other hand, the Court has also noted that Indian tribes retain sovereignty over *both* their members and their territory.[135] In addition, many other Supreme Court cases implicitly extend Indians' status as "sovereign" to civil cases involving non-Indians. When the *Wheeler* Court listed some areas of implicit divestiture, it referred to the assumption of *criminal* jurisdiction over nonmembers.[136] In *Duro v. Reina*,[137] the Court acknowledged that tribal civil jurisdiction was different than tribal criminal jurisdiction. The Court stated that its decisions regarding tribal civil jurisdiction "recognize broader retained tribal powers."[138] Tribes may enjoy the status of "sovereign" in relation to non-Indians and nonmembers in civil proceedings. Focusing on the difference between tribal sovereignty in civil matters and tribal sovereignty in criminal matters brings one back to the *Montana* analysis. It is likely that answering the *Montana* analysis question of, "Does the tribe have jurisdiction?" will answer — and is in fact the same as — the question, "Is the tribe the Sovereign?"

A related issue, and one considered by the *Wheeler* Court, is the effect of the implicit divestiture of Indians' power to alienate land. The touchstone of the Indians' "domestic dependent status" is that tribes gave up the power to alienate their lands. The United States holds Indian lands in trust for the tribe. Based on this limitation, one might argue that tribal forfeiture laws which attempt to forfeit land would be invalid because only the sovereign (the

132. *Id.* at 328-29; *see also id.* at 328 n.24 ("This Court has referred to treaties made with the Indians as 'not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.'" (quoting United States v. Winans, 198 U.S. 371, 381 (1905))).

133. *Id.* at 323.

134. *Id.*

135. *Id.*

136. *Id.*

137. 495 U.S. 676 (1990).

138. *Id.* at 687-88.

United States) can bring proceedings to perfect the sovereign's title. If Congress delegated this power to the tribes, forfeiture of real property would be valid. If not, tribal forfeiture laws would be limited to forfeiture of non-real property.

C. Direct Effect on the Tribe

Even in the absence of congressional delegation, tribes retain civil jurisdiction over the activities of non-Indians when the activity occurs on property located within the reservation if the activity has a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[139] The exercise of jurisdiction over forfeitures satisfies this element of the *Montana* test in several ways. First, contraband directly affects the health and welfare of the tribe, and may affect its economic security as well. Second, forfeiture laws deprive lawbreakers of the instrumentalities and the proceeds of crime. For example, depriving a drug smuggler of a vehicle used to transport drugs across or within Indian land protects the health and welfare of the tribe. Third, because the tribe is seeking to perfect its title to the property at issue and because regulation of reservation land is directly related to sovereignty, denying the tribe jurisdiction would have a direct effect on the political integrity of the tribe.

To some extent, Congress has already addressed this issue. In the Tribal Justice Systems Act, Congress tracked the language of *Montana* to state that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."[140] Congress also found that tribal justice systems and tribal courts are "the appropriate forums for the adjudication of disputes affecting personal and property rights."[141] Tribal courts are appropriate forums for the resolution of personal and property rights of both Indian and non-Indian individuals.[142] These two congressional findings strongly support the exercise of civil jurisdiction by tribal courts.

1. The Economic Security, Health, or Welfare of the Tribe

Law enforcement on Indian reservations is directly related to the health and welfare of Indian tribes. The cumulative effect of *Oliphant* and congressional acts affecting criminal jurisdiction on reservations has left a void in law

139. Montana v. United States, 450 U.S. 544, 556 (1981) (citations omitted). There may be two aspects to this portion of the *Montana* analysis. Courts should assess (1) the effect that the activities of the non-Indians will have on the tribe and (2) "what the effect would be if the tribe were categorically denied the regulatory authority it sought to assert." Bowen, *supra* note 87, at 657 nn.409-10. Bowen noted that this two part analysis was the analysis the district court undertook in South Dakota v. Bourland, No 88-3049, slip. op. at 9-18 (D.S.D. Aug. 21, 1990).

140. 25 U.S.C. § 3601(5) (1994).

141. *Id.* § 3601(6).

142. S. REP. NO. 88, *supra* note 120, at 8.

enforcement, and has resulted in reservations being labelled "havens" for criminal offenders.[143] Indian tribes face a Hobson's choice: Exclude non-Indians entirely from the reservation and lose valuable revenue, or invite non-Indians on the reservation and risk lawless acts by individuals who are immune to punishment by the tribe.

Forfeiture of contraband is a remedial measure that protects the economic security, health, and welfare of the tribe because it removes dangerous or illegal items from Indian society,[144] items in which individuals have no legal property right.[145] Civil forfeiture also compensates the tribe for injury suffered as a result of the illegal activity. Forfeiture of proceeds will diminish the entry of contraband onto reservations and will support the tribe in its efforts to maintain the safety of the reservation.

The Supreme Court has cited a number of cases that sustain the exercise of civil jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[146] In one such case, *Williams v. Lee*,[147] the Court held that a tribal court had exclusive jurisdiction over an action brought by a non-Indian against an Indian to recover the price of goods sold on credit to the Indian on the reservation. The Court stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.[148]

Tribal forfeiture provisions would protect the tribe from lawless outsiders by returning a great measure of authority over their reservations to the tribal governments regarding activities and transactions that occur on the reservation.

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143. *See supra* part I.

144. *See* Austin v. United States, 509 U.S. 602, 620 (1993); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984).

145. Cooper v. City of Greenwood, 904 F.2d 302, 305 (5th Cir. 1990). *See supra* notes 37-38 and accompanying text (stating that contraband is intrinsically illegal).

146. Montana v. United States, 450 U.S. 544, 566 (1981).

147. 358 U.S. 217 (1959).

148. *Id.* at 223.

2. The Tribe's Political Integrity

In a civil forfeiture, the sovereign brings an action to perfect title to property that has been connected with violations of the laws of the sovereign. For example, money that is used to purchase illicit drugs becomes property of the sovereign *at the time of the transaction.* Indian tribes possess power to enact and enforce forfeiture laws because tribes possess power to regulate both persons and property within a reservation. This power is necessary for any sovereign to have political integrity.

The power to regulate non-Indian individuals on Indian reservations is a basic governmental power that the Court has consistently held as within the elements of the sovereignty that the Indians retain.[149] "Indian self-government, the decided cases hold, [also] includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, . . . *to regulate property within the jurisdiction of the tribe,* . . . and to administer justice."[150] This statement leads of the question of, "What is within the jurisdiction of the tribe?" The reasonable answer, however, is that the tribe's jurisdiction is coterminous with the reservation's boundaries.

The boundaries of sovereignty and the boundaries of tribal jurisdiction are linked to territorial boundaries.[151] Indian tribes have a direct and vital interest in their land. Federal courts look to the effect of treaties and statutes on Indian territories to determine whether tribal sovereignty has been

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149. Charles F. Wilkinson, *Basic Doctrines of American Indian Law, in* INDIANS AND CRIMINAL JUSTICE 75 (Laurence French ed., 1982); *see also* Powers of Indian Tribes, 55 Interior Dec. 14 (Dec. 14, 1934), *reprinted in* 1 U.S. DEP'T OF INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974, at 445 (1979) [hereinafter OP. SOLIC. DEP'T INTERIOR] (stating that Indian Nations have the power to regulate the use of property by their members and by non-Indians within their jurisdiction).

150. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122-23 (Univ. of N.M. photo. reprint 1971) (1942).

151. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) ("[T]here is a significant geographical component to tribal sovereignty."); Williams v. Lee, 358 U.S. 217, 223 (1958) (finding that a merchant's status as a non-Indian is irrelevant to the question whether the tribe had jurisdiction over him because the merchant's business was within the tribe's reservation and the debt at issue arose on the reservation); United States v. Plainbull, 957 F.2d 724, 727 (1992) ("A tribal court presumptively has jurisdiction over activities that take place on tribal land."); *see also* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) (citations omitted) (stating that civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts). *See generally* Judith V. Royster, *The Legacy of Allotment,* 27 ARIZ. ST. L.J. 1, 2-5, 43-53 (1995) (asserting that control over territory is the most essential element of sovereignty).

Territorial boundaries are not only linked to "inherent sovereignty," territorial boundaries also determine whether the land is Indian country for purposes of federal law. COHEN 1982 ED., *supra* note 87, at 499 (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Decoteau v. District County Court, 420 U.S. 425 (1975)). In addition, vacillating federal policy towards the status of Indian tribes has always linked the extent of self-determination and self-government to title and control of Indian land.

diminished. In *Brendale v. Confederated Tribes & Bands of the Yakima Nation*,[152] a Supreme Court inquiry into the extent of tribal jurisdiction over non-Indians turned on the extent to which the tribe had preserved the "character" of the reservation land.[153] The enactment and enforcement of forfeiture law is an effective and important method by which tribes may control the character of the reservation land. Forfeiture law removes contraband — property which is illegal and would alter the character of the reservation — from persons who would bring it onto the reservation. Forfeiture is an alternative to the *criminal* justice system. It is a method of regulatory enforcement[154] that protects Indian tribes' lands and political integrity.

The Supreme Court has consistently recognized the importance of sovereignty to Indians. In a 1981 decision, the Supreme Court quoted a 1879 Report of the Senate Judiciary Committee:

> We have considered [Indian tribes] as invested with the right of self-government and *jurisdiction over the persons and property within the limits of the territory they occupy*, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, *they may enact the requisite legislation to maintain peace and good order, improve their condition*, establish school systems, and aid their people in their efforts to acquire the arts of civilized life.[155]

Civil forfeiture proceedings would protect the Indians' special interest in maintaining peace and good order within their territory. They are in fact necessary to maintain peace and good order on reservations because Indian tribes do not have criminal jurisdiction over non-Indians.

D. Consensual Relationships

Montana established a second exception under which tribes may exercise civil jurisdiction over non-Indians. Tribes "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[156] This portion of the *Montana* analysis focuses on consensual relationships in a "commercial" context. One might argue, however, that entry of non-Indians onto the reservation is

152. 492 U.S. 408 (1989).

153. *See infra* part V.

154. Cheh, *supra* note 21, at 1340 (citing Fried, *supra* note 31, at 381).

155. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982) (quoting S. REP. NO. 698, 45th Cong., 3d Sess. 1-2 (1879) (emphases added)).

156. Montana v. United States, 450 U.S. 544, 565 (1981) (citations omitted).

"commercial," or that other non-commercial consensual relationships also give rise to tribal jurisdiction over non-Indians. The Supreme Court has stated that "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands is conditioned by the limitations the tribe may choose to impose."[157] The very act of entering onto Indian land begins a consensual relationship, making tribal jurisdiction appropriate.

To make this consent explicit, tribes could post signs that condition entry to the reservation upon consent to tribal jurisdiction in the event of a forfeiture proceeding. The Suquamish Tribe, for example, has this type of warning posted below a highway sign that reads, "Entering Port Madison Indian Reservation." The warning states: "ENTRANCE ONTO THE RESERVATION WILL BE DEEMED TO IMPLY CONSENT TO SUBMISSION TO THE LAWFUL JURISDICTION OF THE SUQUAMISH INDIAN TRIBE."[158] One might analogize this consensual relationship to a choice of law provision in a unilateral contract. One consents to tribal jurisdiction upon entering the reservation for civil actions which occur on the Indian land. *Montana* actually lists contracts as one area within the purview of the consensual relationship.

E. Power To Exclude

In *Montana*, the Supreme Court reiterated that one of the attributes of sovereignty is the power to exclude non-Indians from Indian lands.[159] The Court emphasized the lower court's finding that "Montana's statutory scheme does not prevent the Crow Tribe from limiting or forbidding non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members."[160] Land owned by or held in trust for the Tribe or its members is of a different character than land owned by non-Indians.[161]

In *Merrion v. Jicarilla Apache Tribe*, the Court stated:

> [N]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes

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157. *Merrion*, 455 U.S. at 147.

158. KIRKE KICKINGBIRD ET AL., INDIAN JURISDICTION 1 (Institute for the Development of Indian Law 1983); *see also* 4 NATIONAL AM. INDIAN COURT JUDGES ASS'N, EXAMINATION OF THE BASIS OF TRIBAL LAW AND ORDER AUTHORITY: JUSTICE AND THE AMERICAN INDIAN 50-51 (National American Indian Court Judges Association., Inc. 1974) (discussing implied consent ordinances adopted by the Salt River Pima-Maricopa Indian Community, the Gila River Indian Community, and the Quinalt Indian Tribe).

159. Montana v. United States, 450 U.S. 544, 557-63 (1981).

160. *Id.* at 557-67.

161. "Because the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which sovereignty is retained." COHEN 1982 ED., *supra* note 87, at 252.

> a lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power . . . to place . . . conditions on the non-Indian's conduct or continued presence on the reservation.[162]

This understanding of tribal sovereignty comports with the civil nature of forfeiture. The tribe could limit or forbid those acts that it deems unlawful on tribal land as a lesser power of the acknowledged power to exclude.[163] This limit would be enforceable by the exercise of civil jurisdiction over the property. Indians would exercise civil jurisdiction to perfect their title to property involved in illegal activity.

F. Conclusion

Oliphant and the *Montana* analysis of jurisdiction both support the exercise of tribal jurisdiction in an in rem forfeiture proceeding. Property is not racial in character and the resolution of property disputes is an internal matter. Tribal courts, therefore, should have jurisdiction over in rem forfeitures. Congress has not forbidden this exercise of tribal sovereignty. Instead, Congress has clearly stated that tribal courts are the appropriate forums for disputes affecting personal and property rights of Indians and non-Indians. Crime and the need for law enforcement against non-Indians and Indians located on reservations have a direct effect on the political integrity and the health and welfare of Indian tribes. In addition, forfeiture is a regulatory power that is a lesser power of the power to exclude non-Indians from the reservation. Indians have the power to place conditions on the entry of non-Indians to the reservation.

All of these factors support the tribe's power to enact and enforce civil forfeiture provisions. Congress has itself enacted many forfeiture provisions, which indicates that Congress considers forfeiture to be an essential aspect of its sovereignty. Congress also has made specific findings that support tribal jurisdiction over non-Indians in civil matters. If Congress believes that this exercise of tribal sovereignty is excessive, Congress may exercise its plenary power and limit tribal sovereignty. Federal courts must not engage in judicial

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162. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45 (1982) (footnote omitted).

163. *See, e.g., id.* at 146-48 (upholding tribe's power to impose oil and gas severance tax on non-Indian lessees of reservation land as a lesser included power of the power to exclude from reservation lands).

activism in this area; to do so would be contrary to Congress's intent. The remedy for an abuse of tribal sovereignty remains with Congress.

V. Brendale v. Confederated Tribes & Bands of the Yakima Nation

The power to exclude is usually discussed in terms of the power to exclude people. But an additional argument supporting tribal jurisdiction in a civil forfeiture is that tribes retain the power to exclude property as well as people. If the power to exclude means anything, it must mean that Indians possess the right to exclude contraband that would alter the character of the Indian people and the Indian land.[164] Contraband is property that is "intrinsically illegal" and the sovereign forbids possession of it.[165] Forfeiture of contraband is especially appropriate because there is no lawful "property right" in contraband.

In 1989, the Supreme Court revisited the issue of the Indians' right to exclude. In *Brendale v. Confederated Tribes & Bands of the Yakima Nation*,[166] the Yakima Indian Nation (the Tribe) petitioned the Court in three separate actions to uphold the Tribe's right to zone and impose land use laws on land that non-Indians owned within the reservation. The reservation consisted of two distinct "areas" that the Court labelled "open" and "closed."[167]

The Court divided into three factions in its decision. Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, found that the Tribe had *no* regulatory authority over lands held in fee by non-Indians.[168] Justice Blackmun, joined by Justices Brennan and Marshall, found that the Tribe had authority to exercise civil jurisdiction over the activities of non-Indians in these cases because zoning and land use laws implicated a significant tribal interest and qualified as an exception under the *Montana* test.[169] Justice Stevens, joined by Justice O'Connor, came to a somewhat "Solomonic" decision.[170] Justice Stevens found that the Tribe had authority to zone the "closed area" of the reservation, but the Tribe did not have authority to zone the "open area" of the reservation.[171] Justice Stevens's opinion not only split the Reservation, it also split the court. None of the

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164. *See infra* part V.B.

165. *See supra* note 37.

166. 492 U.S. 408 (1989).

167. Although all of the opinions treat the reservation as consisting of two distinct areas, the members of the Court did not all agree that this was the case. Justice White stated that an intervening decision by the Bureau of Indian Affairs had opened the "closed area" to the public. *Id.* at 415 n.2.

168. *Id.* at 425.

169. *Id.* at 450.

170. *Id.* at 448 (Justice Blackmum wrote that the "[c]ourt's combined judgment in these consolidated cases . . . is Solomonic in appearance only.").

171. *Id.* at 444-45.

three opinions commanded a majority of the Court but Justices Stevens and O'Connor cast the deciding votes in all three actions.

A. Justice Stevens's Solomonic Opinion

Justice Stevens stated that the "tribe's power to exclude nonmembers from a defined geographical area obviously includes the lesser power to define the character of that area."[172] The Tribe had adopted resolutions restricting entrance to the "closed area" to protect the area's distinctive resources. In addition, the "closed area" consisted of 807,000 acres, only 25,000 of which were owned in fee.[173] Thus, Justice Stevens found that the Tribe had a "historic and consistent interest in preserving the pristine character of this vast, uninhabited portion of its reservation."[174] The "open area," on the other hand, was a much smaller area, a large portion of which was owned by nonmembers as a result of the Indian General Allotment Act (also known as the Dawes Act).[175]

Justice Stevens stated that the labels "open area" and "closed area" were "irrelevant" to his analysis. "What is important," Justice Stevens wrote, "is that the Tribe has maintained a defined area in which only a very small percentage of the land is held in fee and another defined area in which approximately half of the land is held in fee."[176] For Justice Stevens, the demographics of the area and the percentage of fee ownership were the determining factors.[177] The extent of the Tribe's sovereignty originally included the power to exclude non-Indians from the entire reservation, but the alienation of property in the "open area" resulted in

> an integrated community that is not economically or culturally delimited by reservation boundaries. . . . Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to define the essential character of the territory. As a result, the Tribe's interest in preventing inconsistent uses is dramatically curtailed.[178]

Justice Stevens found that the Tribe retained a strong interest in preserving the character of the "closed area." Congress did not intend that tribes would

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172. *Id.* at 434.

173. *Id.* at 438-40.

174. *Id.* at 440.

175. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1994)). The Dawes Act provided for the allotment and subsequent alienation of reservation land. *Brendale*, 492 U.S. at 436.

176. *Brendale*, 492 U.S. at 437 n.2.

177. *Id.* at 447-48. The members of the Yakima Nation comprised less than twenty percent of the total population of the "open area." *Id.* at 445.

178. *Id.* at 444-45.

lose control over the character of their entire reservation based on the transfer of a small percentage of land.[179]

B. Brendale and Civil Forfeiture

Justice Stevens's opinion suggests that tribal jurisdiction in a civil forfeiture affecting property of a non-Indian might be proper as a lesser part of the power to exclude only if the situs of the action giving rise to the forfeiture was located in a "closed" portion of the reservation. To qualify as a closed portion of the reservation, the tribe must have an interest in preserving the character of that portion of its reservation. The tribe does not have to forbid nonmembers entirely from entering the area, but the area must be distinct in its importance to the tribe. In *Brendale*, the fact that nonmembers had access to the "closed area" and the right to drive on roads that traversed the "closed area" did not eliminate the tribe's right to determine the character of that area of the reservation.[180] Justice Stevens was satisfied that the tribe still retained the power to exclude, which "necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community."[181] Tribes generally retain the power to exclude. Congress may diminish that power by federal statute, or the Tribe may voluntarily surrender the power to exclude.[182]

Although *Brendale* appears to bear directly on the issue of tribal jurisdiction, Justice Stevens's opinion may provide little insight into the propriety of tribal forfeiture laws, for at least three reasons. First, it may be too dependent on or tied to the specific instance of an attempt to exercise jurisdiction in a zoning capacity. Justice Stevens wrote that zoning was intimately related to the maintenance of cultural and community self-definition. "Zoning is the process whereby a community defines its essential character."[183] The Court might find that civil forfeiture is not necessary to define the tribe's "essential character." (On the other hand, forfeiture would provide tribal law enforcement authorities with a practical method to protect the character of Indian land.) Second, *Brendale* may be distinguishable from a forfeiture action because forfeiture does not require jurisdiction over a person. In a civil forfeiture, the sovereign proceeds directly against the property; therefore, Justice Stevens's *Brendale* test might not apply at all. Third, Stevens's opinion might provide little assistance when evaluating tribal forfeiture laws, because

179. *Id.* at 441.

180. *Id.* at 440.

181. *Id.* at 433.

182. *Id.*

183. *Id.* Stevens is afraid that nonmembers will not respect the religious or spiritual importance the tribe places in the land — that they will "bring a pig into the parlor." *See generally* C.E. Willoughby, Comment, *Native American Sovereignty Takes a Back Seat to the "Pig in the Parlor": The Redefining of Tribal Sovereignty in Traditional Property Law Terms*, 19 S. ILL. U. L.J. 593 (1995).

any analysis drawn from the opinions in *Brendale* digresses into a *Montana* analysis.

Justice Stevens accepted the district court's finding that the conduct of non-Indians in the "closed area" on fee lands posed a threat to the welfare of the tribe.[184] This finding parallels one of the factors in the *Montana* analysis. A tribe may retain civil jurisdiction over non-Indians if the conduct of non-Indians has a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[185] Thus, Justice Stevens's opinion ultimately may differ from Justice White's opinion only in its acceptance of this finding. Justice White's opinion followed a *Montana* analysis, but when it reached the "direct effect" portion of the test, it heightened the degree of proof necessary to establish tribal authority. Justice White stated:

> *Montana* suggests that in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But, as we have indicated above, that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has *some* effect on the tribe. The impact must be *demonstrably serious* and must *imperil* the political integrity, economic security, or the health and welfare of the tribe.[186]

Brendale appears to be a battle over the importance and distinctiveness of tribes and their sovereignty. The Blackmun trio found that the nonmembers' conduct had a direct effect on the tribe. This alone was enough. Justices Stevens and O'Connor accepted the district court's finding that the actions had a direct effect, but added an additional inquiry into the demographics. Justice White's group of four put the burden of proof on the Tribe to intervene in federal court, and to establish that the actual uses authorized by the Yakima County zoning authorities on the nonmembers' property were demonstrably serious, did not respect the rights of the Tribe, and would imperil the political integrity, economic security, or health and welfare of the tribe.[187]

Recent changes in the Court's composition emphasize the inquiry into whether a nonmember's conduct has a direct effect on the tribe.[188] None of the Blackmun trio remain on the Court. Justices Breyer, Ginsburg, Souter, and

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184. *Brendale*, 492 U.S. at 443.

185. Montana v. United States, 450 U.S. 544, 556 (1981) (citations omitted).

186. *Brendale*, 492 U.S. at 430-31.

187. *Id.* at 431-32.

188. Even the more recent case of South Dakota v. Bourland, 508 U.S. 679 (1993), discussed *infra* at part VI, did not decide which of the three tests determined whether there is a direct effect. The *Bourland* Court remanded the case to the Eighth Circuit on this issue. *Id.* at 695.

Thomas might side with any of the three *Brendale* factions. All three factions require some type of analysis into the effect a nonmember's action has on the tribe. Establishing tribal jurisdiction over a civil forfeiture proceeding, therefore, will require some proof of an effect on the tribe. It may require proof that forfeiture proceedings involve an important aspect of sovereignty, that it has a demonstrably serious impact on tribes, and that it imperils the political integrity, economic security, or health and welfare of the tribe.

VI. Bourland and a Current Assessment of Tribal Forfeiture's Prospects

In a 1993 case, *South Dakota v. Bourland*,[189] the Supreme Court reaffirmed the fundamental *Montana* analysis of a tribe's civil jurisdiction over non-Indians. The Court's reasoning in *Montana*, *Brendale*, and *Bourland* indicates that Indian tribes may exercise civil jurisdiction over non-Indians on tribal land located within a reservation if Congress delegates jurisdiction to the tribe, or if either of the two *Montana* exceptions are satisfied (consent of the non-Indians or establishing a significant tribal interest). *Bourland* heightened the importance of determining whether the tribe retains the power to exclude non-Indians. If the tribe retains such power, it also retains the power to regulate non-Indians, and it is likely that the tribe has extensive civil jurisdiction over non-Indians. Indian sovereignty is at its fullest, and tribal jurisdiction over non-Indians is in fact presumed, when a tribe seeks to exert civil controls over Indian land that is owned by or held in trust for the tribe.

A. South Dakota v. Bourland

Bourland presented the Supreme Court with another opportunity to assess the status of the *Montana* analysis. In *Bourland*, South Dakota challenged the Cheyenne River Sioux Tribe's authority to enforce tribal hunting and fishing regulations against non-Indians on land that had been taken by the federal government to build the Oahe Dam and Reservoir (the "taken land"). The Government acquired 104,420 acres of land owned by or in trust for the tribe and 18,000 acres of land owned privately and held in fee by non-Indians.[190] All of the land acquired by the Government was located within the reservation.

The Court applied the *Montana* analysis and concluded that Congress did not affirmatively delegate authority over the taken land to the tribe. The Court then cited both *Montana* and *Brendale* for the proposition that the tribe's power to exclude had terminated when the tribe alienated the land.[191] The Court reasoned that the loss of the power to exclude non-Indians included a

189. 508 U.S. 679 (1993).

190. *Id.* at 683-84.

191. *Id.* at 689. The Court noted that the district court had found that the taken land was not "closed" or "pristine," and that "the area at issue here has been broadly opened to the public." *Id.* at 689 n.9.

loss in the tribe's power to regulate non-Indians. "The power to regulate is of diminished practical use if it does not include the power to exclude: regulatory authority goes hand in hand with the power to exclude."[192]

The Court next evaluated general principles of "inherent sovereignty." The Court applied the *Montana* presumption against tribal jurisdiction over non-Indians[193] and found that a tribe's inherent sovereignty does not extend to the relations between a tribe and nonmembers on land that the tribe does not own, unless one of the two *Montana* exceptions applies.[194] The Court remanded the case to the Eighth Circuit to evaluate these issues.[195]

B. Assessing Tribal Jurisdiction After Bourland

Although the Court reaffirmed the basic *Montana* analysis, the *Bourland* decision is fairly limited in its prescriptions. Two issues appear clear. First, when an Indian Tribe invokes general principles of "inherent sovereignty" as a source of tribal jurisdiction over non-Indians on *non-Indian fee lands*, the Court applies the *Montana* presumption *against* tribal authority. This presumption is overcome only if Congress expressly delegates such power or one of the two *Montana* exceptions applies.[196] Second, when land within a reservation is alienated to non-Indians, the Court will consider the legislation carefully. If the legislation "opens" this land within the reservation so that the Indians do not have the right of exclusive occupation or the power to exclude, then the Court will find that the tribe has lost the power to enforce its regulations against non-Indians on the taken land.[197]

For purposes of this article, *Bourland* may be as important for what it does not say as for what it says. *Bourland* does not mean that in every case where reservation land has been opened to outsiders the Indian Tribe will lose its right to regulate. The Court stated that "[t]he abrogation of this greater right, *at least in the context of the type of area at issue in this case*, implies the loss of regulatory jurisdiction over the use of the land by others."[198] The Court's limitation to the facts of this case implies that the right to regulate was not completely abrogated.[199] The Court noted that *Bourland* involved an area that was neither a closed area nor a pristine area: it was "broadly" open.[200]

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192. *Id.* at 691 n.11.

193. *Id.* at 694-95. "The exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation . . . ." Montana v. United States, 450 U.S. 544, 564 (1981).

194. *Bourland*, 508 U.S. at 695 n.15.

195. *Id.* at 695.

196. *Id.*; *see also* Bowen, *supra* note 87, at 644 nn.315-16.

197. *Bourland*, 508 U.S. at 688-91; Bowen, *supra* note 87, at 645 nn.317-19.

198. *Bourland*, 508 U.S. at 689 (emphasis added) (footnote omitted).

199. Bowen, *supra* note 87, at 645 n.319.

200. *Bourland*, 508 U.S. at 689 n.9.

"If a case involved an area that was not 'broadly' open, was 'pristine,' or was 'significant to the tribe culturally, religiously, or economically,' then the Court might conclude that the loss of the tribe's treaty right to exclude does not necessarily mean that the right to regulate was also abrogated by the alienation of the land."[201]

Bourland's adoption of a presumption against tribal authority over non-Indians is also limited to the facts of the case. This presumption applies only when the activities of non-Indians occur on alienated land — *land that is owned by non-Indians*.[202] When a tribe seeks to assert authority over the activities of non-Indians and the activities occur on tribal lands, the Court should presume that Indians retain inherent sovereignty.[203] The *Bourland* decision itself indicates that if the tribe retains the right to exclude, the tribe should have broad power to regulate non-Indians, because the tribe has retained the fullest amount of sovereignty. "[R]egulatory authority goes hand in hand with the power to exclude."[204] Finally, the findings made and the assumptions expressed by Congress in the Indian Tribal Justice Act contravene the presumption against tribal jurisdiction that underlies the *Bourland* decision. Congress presumes that tribes retain jurisdiction.[205]

VII. Relevant Cases

Although there are no cases assessing directly the propriety of tribally enacted and enforced forfeiture provisions, several cases may be relevant to such an analysis. This part of the article will discuss three such cases. In *Hamilton v. United States*,[206] the U.S. Court of Claims assessed whether it

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201. Bowen, *supra* note 87, at 645 n.322 (quoting *Bourland*, 508 U.S. at 689 n.9).

202. *Bourland*, 508 U.S. at 692-95.

203. *See* Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408, 443 (1989) (upholding tribal authority to zone fee lands located in a "closed" area, but denying authority to zone fee lands in the "open" area of the reservation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45 (1982) ("Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands is conditioned by the limitations the Tribe may choose to impose."); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."); United States v. Mazurie, 419 U.S. 544, 556-69 (1975) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it."). *See supra* part IV.B.2 (Congress's findings in the Indian Tribal Justice Act require presumption of tribal sovereignty on reservation land).

204. *Bourland*, 508 U.S. at 691 n.11 (citing *Brendale*, 492 U.S. at 423-24); *see also id.* at 688 (stating that the power to regulate non-Indian use of taken land is a "lesser-included, incidental power" of the power to exclude non-Indians).

205. *See* discussion *supra* part IV.B.2

206. 42 Ct. Cl. 282 (1907).

had jurisdiction over a case in which a tribe seized and sold the property of a non-Indian located within a reservation. In *Babbitt Ford, Inc. v. Navajo Indian Tribe,*[207] the Ninth Circuit evaluated the Navajo Tribe's enactment and enforcement of a civil ordinance governing self-help repossession within the reservation's boundaries. These two cases involve civil ordinances enacted by tribes that extend tribal sovereignty over property located on the reservation as a result of the actions of non-Indians, and the cases support the position taken in this article. One additional case may cut the other way. In *Quechan Tribe of Indians v. Rowe,*[208] the Ninth Circuit held that the Quechan Tribe, in the Quechan Constitution itself, had foresworn the power to forfeit weapons of a non-Indian as a consequence of violating tribal law.

A. Hamilton v. United States

In 1907, the United States Court of Claims held in *Hamilton v. United States*[209] that it had no jurisdiction over James Hamilton's claim against the United States and the Chickasaw Nation.[210] Hamilton was a non-Indian who accepted a license to trade with the Chickasaw Nation. Hamilton purchased a number of dwellings, storehouses, and other buildings valued at $3050 from the United States. The buildings were all located on the Chickasaw Reservation.

The Chickasaw Nation took possession of the property and sold it pursuant to a statute passed by the Chickasaw legislature.[211] Hamilton brought suit in the Court of Claims to recover the value of the property taken. Hamilton based his claim on the Indian Depredations Act of March 3, 1891. The Court of Claims held that it had no jurisdiction in the case. The Act conferred jurisdiction upon the Court of Claims

> to inquire into and finally adjudicate . . . [a]ll claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.[212]

The court stated that the Act provided relief for the forcible and illegal taking or destruction of property by Indians, but it did not provide relief for "a

207. 710 F.2d 587 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984).

208. 531 F.2d 408 (9th Cir. 1976).

209. 42 Ct. Cl. 282 (1907).

210. *Id.* at 286-87.

211. *Id.* at 282. The Chickasaw Treaty, July 10, 1866, 14 Stat. 772, provided that the Chickasaw general assembly had power to legislate and that all laws enacted by the assembly would take effect unless suspended by the Secretary of the Interior or the President.

212. *Id.* at 286.

peaceful taking of property in pursuance of law and after due notice of an intention to do so."[213]

In *Hamilton*, the Court of Claims recognized the power of the tribe over its territory. The Court stated that, by applying for and accepting a license to trade with the Chickasaws and acquiring property within the limits of the Chickasaw reservation, Hamilton subjected himself to the jurisdiction of the tribe's laws.[214] That *Hamilton* is a Court of Claims' decision does not limit its reasoning to suits brought under the Indian Depredations Act. The Solicitor General cited *Hamilton* in an opinion titled "Powers of Indian Tribes."[215] In the section titled "Tribal Powers Over Property," the solicitor concluded:

> It clearly appears from the foregoing cases, that the powers of an Indian tribe are not limited to such powers as it may exercise in its capacity as a landowner. In its capacity as a sovereign, and in the exercise of local self-government, it may exercise powers similar to those exercised by any State or nation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress.[216]

Forfeiture is one method a sovereign employs to "regulat[e] the use and disposition of private property."

Hamilton and the Solicitor's reference to the case make clear that tribal forfeiture is appropriate if the tribe enacts a statute, gives notice of its intent to forfeit property, and follows prescribed procedures.

B. Babbitt Ford, Inc. v. Navajo Indian Tribe

Hamilton initially indicates that by accepting a license to trade with a tribe and acquiring property within the limits of a reservation, non-Indians subject themselves to the jurisdiction of the tribe, whose land they enter and use. The next important question is whether *mere presence* on a reservation is enough for a tribe to exercise civil jurisdiction over a non-Indian's *property.*

In 1983, the Ninth Circuit applied the *Montana* test and extended tribal jurisdiction to non-Indians as a result of their presence on a reservation in *Babbitt Ford, Inc. v. Navajo Indian Tribe.*[217] The Ninth Circuit upheld the Navajo Tribe's enactment and enforcement of a civil ordinance governing self-help repossession within the reservation's boundaries. Although the Supreme

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213. *Id.*

214. *Id.* at 287.

215. 55 Interior Dec. 14, 55 (1934), *reprinted in* OP. SOLIC. DEP'T INTERIOR, *supra* note 149, at 445, 470. The Solicitor also quoted the case of Delaware Indians v. Cherokee Nation, 38 Ct. Cl. 234, 251 (1903), *decree modified,* 193 U.S. 127 (1904) ("[T]he law of real property is to be found in the law of the situs. The law of real property in the Cherokee country, therefore, is to be found in the constitution and laws of the Cherokee Nation.").

216. 55 Interior Dec. at 55, *reprinted in* OP. SOLIC. DEP'T INTERIOR, *supra* note 149, at 471.

217. 710 F.2d 587 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984).

Court subsequently denied certiorari, the Ninth Circuit's opinion is important. The facts of the case reveal that *Babbitt* is "closely related to tribal law enforcement"[218] and therefore may prove directly relevant in assessing the validity of tribal forfeiture laws. If federal courts are willing to allow tribal jurisdiction over non-Indians based on mere presence on a reservation, then the courts should uphold tribal jurisdiction over *property* located on a reservation. This ruling would not be an extension of *Babbitt*. It would be a lesser, included corollary of the *Babbitt* holding because it affirms tribal jurisdiction over property located on a reservation, rather than people.

Babbitt owned a car dealership in Arizona that was located near to, but not within, the boundaries of the Navajo reservation. The dealership sold a substantial number of automobiles to individual members of the Tribe. Babbitt made and negotiated all sales at the dealership, and the automobiles were delivered off of the reservation.[219] The majority of these sales included loan contracts that gave the dealer a right to repossess the car in case of default. The Navajo Tribe had an ordinance that prohibited self-help repossessions on the reservation without first obtaining the permission of either the owner of the vehicle or the tribal court.[220] Any nonmember of the Navajo Tribe, who willfully violated this ordinance could be excluded from the reservation, and would be liable for liquidated damages.[221]

Babbitt violated the ordinance by entering the reservation and repossessing vehicles without consent of the owners or the tribal court. The car owners brought suit in the tribal court. The tribal court found that Babbitt had violated the ordinance, and the court awarded damages to the owners.[222] The Ninth Circuit upheld the ordinance and the tribal court's decision. The court stated that "[t]he Navajo consent regulation at issue in this matter is a necessary exercise of tribal self-government and territorial management: the regulation is designed to keep reservation peace and protect the health and safety of tribal members."[223] The court noted that the decision in *Merrion v. Jicarilla Apache Tribe* also supported this exercise of tribal civil jurisdiction over non-Indians because "the 'limited authority' over nonmembers does not arise until they enter tribal lands or conduct business with the tribe."[224] Explicit consent to the tribe's exercise of civil jurisdiction was not necessary, and the tribe did not give up its sovereign power by permitting entry of non-Indians. The tribe merely "agrees not to exercise its ultimate power to oust

218. William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349, 420 (1992).

219. *Babbitt*, 710 F.2d at 590.

220. *Id.* Sections 607 through 609 of the Navajo Tribal Code, Enacted in 1968, contained the ordinance referred to in *Babbitt*. NAVAJO TRIB. CODE tit. 7, §§ 607-609 (1968).

221. *Babbitt*, 710 F.2d at 590-91 (citing NAVAJO TRIB. CODE, tit. 7, §§ 607-609).

222. *Id.* at 591.

223. *Id.* at 593.

224. *Id.* (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982)).

the non-Indian as long as the non-Indian complies with the initial conditions of entry."[225]

By entering the reservation Babbitt became subject to the tribe's exercise of sovereign power.[226] *Oliphant* eliminated tribal criminal jurisdiction. However, tribes still retain the power to exclude, which includes the power to "place conditions on entry, on continued presence, [and] on reservation conduct . . . ."[227] The Ninth Circuit found, therefore, that the Navajo Tribe had authority to exercise civil jurisdiction over Babbitt because he failed to respect these conditions.[228]

The issue of tribal jurisdiction in a civil forfeiture is very similar to the issues raised by the repossession ordinance in *Babbitt*. The civil repossession ordinance was necessary because the tribe was unable to exercise criminal jurisdiction. The tribe could not criminally punish Babbitt for failing to obtain consent of the tribe or the owner, but the tribe could condition and did condition the entry of nonmembers. Civil forfeitures are likewise necessary because tribes may not punish non-Indian criminal offenders. Tribes may condition entry of nonmembers by forbidding certain conduct on the reservation. Nonmembers would have a "lawful property right to be on Indian land" but this right would not grant complete immunity from Indian sovereignty.[229] Failure to abide by the initial conditions of entry would permit the tribe to exercise civil jurisdiction over the *property* involved in the forbidden conduct.

The Navajo consent regulation at issue in *Babbitt* satisfied the *Montana* test because it was "a necessary exercise of tribal self-government and territorial management: the regulation [was] designed to keep reservation peace and protect the health and safety of tribal members."[230] The Ninth Circuit's opinion appears to collapse two of the aspects of the *Montana* test. Having a direct effect on the tribe's health and welfare seems to pose a threat to the tribe's political integrity. Tribal civil forfeiture laws would satisfy *Montana* for the same reasons. Exercising jurisdiction over property that is involved in forbidden conduct is "a necessary exercise of tribal self-government and

225. *Merrion*, 455 U.S. at 144.

226. *See id.* at 146 ("Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.").

227. *Id.* at 144.

228. *Babbitt*, 710 F.2d at 595. Two district court cases seem to contravene a broad extension of tribal jurisdiction. In UNR Resources v. Benally, 514 F. Supp. 358 (D.N.M. 1981), and UNR Resources v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981), the trial courts invalidated Navajo ordinances granting the tribal courts jurisdiction over nonmembers who caused damage on the reservation. These cases are inapposite to the issue of tribal forfeiture because the damage that occurred was a spill of radioactive material. The spill occurred *outside* of the reservation but resulted in damage to livestock and property within the reservation.

229. *Merrion*, 455 U.S. at 144.

230. *Babbitt*, 710 F.2d at 593.

territorial management"[231] because civil forfeiture laws would assist in keeping the peace on the reservation. Civil forfeitures also would protect the health and safety of tribal members.[232] Forfeiting the instrumentalities connected with forbidden conduct is an effective deterrent to individuals who would otherwise violate a tribe's ordinances.

Babbitt is also relevant to forfeiture because it involved implied consent to jurisdiction by presence on the reservation. Several tribes have enacted legislation granting tribal courts nonconsensual civil jurisdiction over nonresidents.[233] The Supreme Court has taken note of such legislation, but has not decided whether the exercise of such jurisdiction is proper.[234]

Nonconsensual tribal jurisdiction over nonresidents is suspect when the "tribal interest" asserted looks more like an "individual interest." An exercise of jurisdiction over nonmembers as a result of a tort which occurred off the reservation and injured members of the tribe, for example, would serve individual interests, not tribal interests.[235] Forfeitures are distinct from laws that simply protect individual interests and jurisdiction is appropriate in such cases. Forfeiture begins as an offense against the sovereign and forfeited property belongs to the sovereign. Forfeitures are inherently related to the interests of the sovereign *as* sovereign.

C. Quechan Tribe of Indians v. Rowe

Alfred Buker, Chief Game Warden of the Quechan Tribe and an officer of the Bureau of Indian Affairs, was in charge of enforcing 18 U.S.C. § 1165. He discovered three non-Indians who he believed were violating section 1165 and tribal game ordinances.[236] Buker did not arrest the non-Indians but he did confiscate their weapons, explaining that they could reclaim them later at the tribal headquarters. The non-Indians reported the incident to the county sheriff's office, which arrested Buker for grand theft of weapons. Although Buker was released and the charges were dismissed, the tribe filed an action against the arresting officers seeking declaratory and injunctive relief. The district court granted summary judgment for the tribe and granted the tribe's request for an injunction.

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231. *See supra* part IV.C.2.

232. *See supra* part IV.C.1.

233. Vetter, *supra* note 218, at 421 n.356.

234. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 138, 142 & n.1 (1984); *cf.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.3 (1978) (holding that tribe had no criminal jurisdiction even though they had a sign posted on entrance to reservation to inform public that entry to reservation would be deemed implied consent to *criminal* jurisdiction of tribal court).

235. *See* Swift Transportation v. John, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (D. Ariz. 1983).

236. Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976).

In *Quechan Tribe of Indians v. Rowe*,[237] the Ninth Circuit affirmed the summary judgment, but denied injunctive relief. In addition, the court declared that the Quechan Tribe did not have power to cause a non-Indian who entered the reservation unlawfully and violated a tribal game ordinance to forfeit weapons or other property.[238] The court based its decision on its finding that the tribal officer who seized the weapon did so as evidence for a tribal prosecution. The court held that the tribal officer lacked such jurisdiction because the tribe, in the Quechan Constitution itself, had foresworn the power to try nonmembers of the tribe for violation of tribal law.[239] The court's decision, therefore, was limited to circumstances in which the forfeiture was effected to further a tribal prosecution of a non-member and to circumstances in which the tribal constitution specifically forbids the tribe from doing so. Tribal forfeitures that are the product of specifically authorized legislation enacted by a tribe and tribal forfeitures that are not effected for the purpose of tribal *prosecution* of non-Indians, present an altogether different situation. Such forfeitures would be civil proceedings and, as such, would be within the realm of Indian sovereignty.

One limitation on tribal forfeitures that *Quechan* tangentially addressed is the fact that a forfeiture proceeding is quasi-criminal in character.[240] *Quechan* does not directly limit tribal forfeitures because the tribe's constitution forbid the tribe from trying non-members and the court's decision is tied to the finding that the weapons were kept for tribal prosecution of non-Indians.[241] In such circumstances, forfeiture violates both the letter and the spirit of the Supreme Court's Indian law precedent. Civil forfeitures that are specifically authorized by tribal legislation, on the other hand, meet the letter of the law. Nevertheless, such forfeiture proceedings are still "quasi-criminal" in character.

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237. *Id.*

238. *Id.* at 411.

239. *Id.*

240. *Id.* (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965)).

241. The Ninth Circuit did not establish a categorical rule that tribal civil forfeitures are invalid because they are "quasi-criminal" proceedings. Had the Ninth Circuit done so, it would have ignored the distinction between the different categories of forfeiture. *See supra* notes 36-40 and accompanying text (defining "contraband," "instrumentalities," and "proceeds"). The category of forfeiture at issue affects the analysis that determines whether it is "remedial" or "punishment." Forfeiture of contraband, for example, is not punishment because an individual has no property right in contraband. In One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237-38 (1972), the Court held that forfeiture as a result of importation without following customs procedures is entirely remedial, and as such it "is a civil sanction." The Ninth Circuit also did not have the benefit of the Supreme Court's recent decision in United States v. Ursery, 116 S. Ct. 2135 (1996) (holding that in rem forfeiture is not punishment and it is not a criminal proceeding). The appropriate analysis of the quasi-criminal nature of civil forfeiture is discussed *infra*.

VIII. The Quasi-Criminal Character of Forfeiture

The *Montana* analysis of tribal jurisdiction in a forfeiture proceeding and federal court decisions regarding analogous extensions of tribal sovereignty, both lead to the conclusion that Indian tribes legally can enact and can enforce civil forfeiture provisions. This may not be enough. The fear animating the Court's decision in *Oliphant* was that allowing tribal courts to punish non-Indians would result in "unwarranted intrusions on their personal liberty" in contravention of basic principles of American justice, like the Bill of Rights.[242] According to Judge William C. Canby, "One of the undercurrents in *Oliphant* is that the tribes cannot be trusted to dispense justice fairly."[243] The use of in rem fictions to support a tribal court's jurisdiction in a forfeiture proceeding raises the very concern that the Supreme Court articulated in *Oliphant* — that allowing Indian tribes to "punish" non-Indians would deprive the non-Indians of basic liberties.

The fundamental skepticism of the federal courts — the belief that "non-Indians will receive less than impartial justice from tribal courts"[244] — may cause some federal courts to reject the clear policies of Congress and the Executive branch favoring Indian self-government and self-determination.[245]

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242. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian Tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

243. William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 11 n.29 (1987). Concern over unfair treatment is not unidirectional. Indians fear that they will not receive fair treatment in state and federal courts. Their concern is backed by a history of poor treatment. Samuel J. Brakel writes that :

> The notion that there are such things as "Indian justice" and "white justice" is too simple and too general to be meaningful. This dichotomy implies a number of equally invalid subdichotomies. Some of the main contrasts are the following:
>
> Indian justice is to white justice as
> impartiality is to prejudice
> humanism is to legalism
> mediation is to adjudication

SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 92 (1978).

244. Superior Oil Co. v. Merritt, 619 F. Supp. 526, 534 (D. Utah 1985).

245. From the early 1960s to the present, self-determination has been the hallmark of federal Indian policy. Both the executive branch and the legislative branch encourage tribal self-determination and self-government. *Compare, e.g., Message from the President of the United States Transmitting Recommendations for Indian Policy*, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1970) (President Nixon's message to Congress urging a policy of self-determination without termination); Memorandum on Government-to-Government Relationship with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 28, 1994) (President Clinton's statement reaffirming that there is a government-to-government relationship between the tribes and the United States) *with* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450a-450n (1994); Tribal Self-Governance Demonstration Project Act of 1991, Pub.

The courts may proclaim that civil forfeiture provisions, an institution of modern American law enforcement, are "inconsistent" with Indian tribes' status as domestic dependent nations. This is the last stopgap of a judiciary that is reluctant to implement congressional policy that fosters Indian sovereignty.

A. Federal Court Review of Indians' Assertions of Civil Jurisdiction over Non-Indians

In *National Farmers Union Ins. Co. v. Crow Tribe of Indians*,[246] a tribal court entered a default judgment against a non-Indian insurance company from an accident occurring on the reservation. The insurance company sought relief in federal court, claiming that the tribe lacked power to enter a civil judgment against the non-Indian company. The Supreme Court held that the insurance company's challenge to the tribe's jurisdiction arose under federal law and that the district court had jurisdiction to hear their argument under 28 U.S.C. § 1331.[247] The Court stated: "The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."[248] The Court held that limitations on tribal jurisdiction are a matter of federal law. An analysis of these limitations requires a careful examination of tribal sovereignty and the extent to which it has been altered, divested, or diminished by treaty, statute, executive branch policy, or through judicial decisions as a result of the tribe's status as a domestic dependent nation.[249]

Tribal forfeiture provisions affect *property* and require the tribal court to assert jurisdiction over *property*, not *people*. Federal review, therefore, will not include a substantive review of the tribal legislation under the ICRA.[250] The review is limited to habeas corpus petitions for tribal actions which violate the ICRA. Tribal courts possess exclusive jurisdiction over non-habeas corpus actions brought to enforce the ICRA.[251] Congress limited federal Court review of forfeiture actions to a determination of whether the tribal

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L. No. 102-84, 105 Stat. 1278 (amending provisions of 25 U.S.C. §§ 450-450n). Congress is cognizant of this policy in the legislation it enacts today. Congress acts carefully to ensure that legislation does not "encroach upon or diminish in any way the inherent sovereign authority of each tribal government . . . ." 25 U.S.C. § 3631 (1994).

246. 471 U.S. 845 (1985).

247. 28 U.S.C. § 1331 (1994) (providing that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

248. *National Farmers Union*, 471 U.S. at 852 (footnote omitted).

249. *Id.* at 854-57.

250. *See supra* notes 85-94.

251. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

court has jurisdiction over the property.[252] If the federal court concludes that the tribal court jurisdiction is proper, then the inquiry ends. The federal court does not inquire whether the tribal court correctly applied tribal law or federal law. "Deprived of the ICRA as a tool, federal judges might understandably turn to the 'inconsistent with their status' test of *Oliphant*. . . . When the plaintiff is [non-Indian], the complaint against tribal authority can often be rephrased out of ICRA terms which attack the exercise of tribal power and turned into an attack on the very existence of tribal power over the non-Indian."[253] This is the last judicial "check" on Indian sovereignty available to skeptical federal judges.

Ultimately, the propriety of tribal forfeiture laws may collapse into two related analyses consisting of a mixture of law and policy. The first question is whether civil forfeiture laws are so essentially "criminal" in nature that a tribe's exercise of jurisdiction in a forfeiture would violate *Oliphant* because it is inconsistent with Indian tribes' status as domestic dependent nations? The second question is whether the Supreme Court is so suspicious of tribal justice systems that it might find that "civil" forfeiture, for purposes of a constitutional analysis, is irrelevant when an Indian tribe is the sovereign? If the answer to either of these questions is "yes," then the Court would strike down tribal forfeiture laws. The following subsections discuss why the answer to both of these questions should be "no."

1. United States v. Ursery: Civil Forfeitures Are "Civil" Proceedings

Although forfeiture proceedings are civil proceedings, the question remains whether tribes can enact and enforce in rem forfeiture procedures because forfeitures are quasi-criminal in character. The Supreme Court went a long way toward answering this question in a recent case. In *United States v. Ursery*,[254] the Court held that the in rem civil forfeitures at issue in that case and civil forfeitures generally are neither "punishment" nor "criminal" for the purposes of the Double Jeopardy Clause.[255]

In *Ursery*, the Supreme Court consolidated one case from the Sixth Circuit and one case from the Ninth Circuit, in which the lower courts held that the Double Jeopardy Clause prohibits the Government from both (1) punishing a defendant for a criminal offense and (2) forfeiting his property for that same offense in a separate civil proceeding pursuant to federal forfeiture laws.[256] The lower courts based their decision, in part, upon their conclusion that the Supreme Court's recent decisions in *United States v. Halper*[257] and *Austin v.*

252. *National Farmers Union*, 471 U.S. at 844 (footnote omitted).

253. Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 421-22 (1988).

254. 116 S. Ct. 2135 (1996).

255. *Id.* at 2149.

256. *Id.* at 2142-43.

257. 490 U.S. 435 (1989) (holding that a civil *penalty* "may be so extreme and so divorced

United States[258] indicated that civil forfeitures were categorically "punishment" for purposes of the Double Jeopardy Clause. Relying on these cases, the lower courts held that it was unconstitutional for the government to both pursue criminal proceedings against the defendants and to institute civil forfeiture proceedings against property seized from or titled to the defendants because such action would constitute two punishments.

In *Ursery*, the Supreme Court rejected the lower court's interpretations of *Halper* and *Austin*. First, the Court noted that it had already considered the relationship between in rem forfeiture and the Double Jeopardy Clause. In *Various Items of Personal Property v. United States*,[259] the government sought in rem forfeiture of a distillery, warehouse, and denaturing plant because the corporation had sought to defraud the government of tax on distilled spirits. To determine the nature of a civil forfeiture, the Court referred to the label affixed by the legislature and stated that "[t]he forfeiture is no part of the punishment for the criminal offense."[260] Thus, the Court held that the Fifth Amendment Double Jeopardy Clause did not apply.[261]

In *Ursery*, the Court described the relevance of *Various Items* as follows: "In reaching its conclusion [in *Various Items*], the Court drew a sharp distinction between in rem civil forfeitures and in personam civil penalties such as fines: though the latter could, in some circumstances, be punitive, the former could not."[262] This presumption is the general rule that pervades the Court's assessment of in rem forfeitures: in rem forfeitures are not criminal and they are not punishment.

The Court next noted that two cases of more recent vintage, *One Lot Emerald Cut Stones v. United States*[263] and *United States v. One Assortment of 89 Firearms*,[264] had affirmed the rule of *Various Items*. In *Emerald Cut Stones*, the Court stated that, in the context of forfeiture, "[t]he question of whether a given sanction is civil or criminal is one of statutory construction."[265] In *89 Firearms*, the Court refined this statement and adopted a two stage analysis. First, the Court determines whether Congress

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from the Government's damages and expenses as to constitute punishment").

258. 490 U.S. 435 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment is not limited solely to criminal proceedings and finding that the forfeiture at issue constituted a payment to the sovereign as punishment for an offense and was therefore subject the limitations of the Excessive Fines Clause).

259. 282 U.S. 577 (1931).

260. *Id.* at 581.

261. *Id.*

262. *Ursery*, 116 S. Ct. at 2141 (citing *Various Items*, 282 U.S. at 581).

263. 409 U.S. 232 (1972) (per curiam).

264. 465 U.S. 354 (1984).

265. *Emerald Cut Stones*, 409 U.S. at 237.

intended the proceedings to be "criminal" or "civil."[266] Second, the Court considers "whether the proceedings are so punitive in fact as to 'persuade us that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' despite Congress' intent."[267] Essentially, the Supreme Court will accept a legislature's intention to establish a civil remedy unless the Court finds "the clearest proof" that the *only* rational purpose and effect of the forfeiture is punitive.[268] In *Ursery*, the Supreme Court applied the *89 Firearms* analysis and concluded that the in rem forfeitures at issue were not "criminal" and did not constitute punishment because Congress intended that they be civil and because the provisions were not "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary."[269]

Applying the *89 Firearms* analysis to tribal forfeiture provisions leads to the inescapable conclusion that tribal forfeitures are "civil" proceedings that are within the scope of powers that Indians may exercise over non-Indians. First, because tribal forfeitures would have to be civil proceedings to comport with *Oliphant*, any tribal legislation should include a clear statement of legislative intent. A clear statement of legislative intent would satisfy the first stage of the *89 Firearms* analysis. Second, in rem forfeitures are not solely punitive. In *Ursery*, the Supreme Court recognized that in rem forfeitures serve a variety of non-punitive purposes.

> Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximate, the nonpunitive purposes served by a particular civil forfeiture.[270]

Tribal forfeiture, therefore, would satisfy the second stage of the *89 Firearms* analysis.

The Supreme Court's decision in *Ursery* should end the inquiry into the "quasi-criminal" nature of tribal forfeiture proceedings. *Ursery* makes clear that in rem tribal forfeiture proceedings that are modelled after federal forfeiture proceedings are not criminal and they are not punishment. The only limit on *Ursery*'s applicability to consideration of tribal forfeiture proceedings is that *Ursery* assessed in rem forfeiture proceedings under the Fifth Amendment's Double Jeopardy Clause. The Supreme Court's

266. *89 Firearms*, 465 U.S. at 366.
267. *Ursery*, 116 S. Ct. at 2147 (quoting *89 Firearms*, 465 U.S. at 366).
268. *89 Firearms*, 465 U.S. at 363.
269. *Ursery*, 116 S. Ct. at 2137-38.
270. *Id.* at 2145.

reasoning in *Ursery* is, however, uniquely relevant to federal Indian law by the very fact that it is grounded in the Double Jeopardy Clause. The Court's discussion of the civil/criminal dichotomy in Indian law is remarkably similar to the Court's Double Jeopardy Clause jurisprudence.

The Double Jeopardy Clause "serves the function of preventing both successive punishments and . . . successive prosecutions. The protection against multiple punishments prohibits the Government from punishing twice, or attempting a second time to punish criminally for the same offense."[271] This parallels the limits that the Supreme Court has placed on Indian Sovereignty.

> The power of the United States *to try and criminally punish* is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power *to try* non-Indian citizens of the United States except in a manner acceptable to Congress.[272]

Ursery makes clear that tribal in rem forfeiture is neither an attempt to "try" a non-Indian nor an attempt to "criminally punish" a non-Indian.

2. Austin v. United States: Civil Forfeitures Are "Remedial"

The fact that a proceeding is "civil" does not insulate it from constitutional scrutiny. The Supreme Court's decision in *Austin v. United States*[273] leaves open the possibility that federal courts could evaluate tribal forfeiture provisions to determine whether they are "remedial" or "punitive."

Austin involved a challenge to the forfeiture of an instrumentality as an excessive fine under the Eighth Amendment. Austin pleaded guilty to possession of cocaine with intent to distribute. Soon thereafter, the United States filed an in rem action seeking to forfeit Austin's mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7).[274] Austin argued that the proceeding violated the Eighth Amendment proscription against excessive fines.

The Court stated that the determinative question in its analysis is whether the forfeiture amounted to a punishment.[275] The civil or criminal nature of a civil in rem forfeiture did not determine whether the Eighth Amendment

271. *Id.* at 2139-40 (internal quotations and citations omitted).

272. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (emphases added).

273. 509 U.S. 602 (1993).

274. *Id.* at 604. These statutes provide for the forfeiture of conveyances and real property that is connected with the violations of the laws regarding "controlled substances, their raw materials, and equipment used in their manufacture and distribution." *Id.* at 605 n.1.

275. *Id.* at 622.

applied.[276] The court did state a general reliance on the civil/criminal dichotomy in applying constitutional protections to civil forfeiture proceedings. The fact that the text of the Eighth Amendment did not expressly limit itself to criminal cases distinguished it from other provisions in the Bill of Rights.[277] Had the founders specifically limited the Eighth Amendment's application to criminal cases, as they limited the Fifth Amendment's proscription against self-incrimination, the Court would not have undertaken an analysis of whether the forfeiture constituted an "excessive fine."[278] But because the Eighth Amendment's protections are not, by its terms, limited to criminal proceedings, the Court considered whether forfeiture was a monetary "punishment."

The Court found that both forfeiture in general and statutory in rem forfeiture in particular were considered, at least in part, as punishment at the time the founders ratified the Eighth Amendment.[279] The Court then extended its analysis to the statutory provisions at issue,[280] but found "nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment."[281] The fact that the statutes also served some remedial purpose did not change the Court's analysis. Only if the civil sanction were *solely* remedial — if it served *no* retributive or deterrent purposes — would it not be subject to the limitations of the Eighth Amendment's Excessive Fines Clause.[282]

The Supreme Court's opinion in *Austin* means that *some* forfeiture provisions are considered punishment for purposes of constitutional analysis. Presumably, the analysis of the "nature" of tribal forfeiture provisions will dovetail with the constitutional "punishment" analysis to some extent. As indicated previously, the two stage analysis developed in *89 Firearms* and applied in *Ursery* should resolve the issue of the propriety of tribal forfeiture in favor of Indian jurisdiction.[283] If, however, federal courts reject the Supreme Court's broad mandate in *Ursery*, then they may fall back on *Austin*'s remedial/punitive analysis. The question then is what tribal forfeiture provisions will be wholly remedial.

In *One Lot Emerald Cut Stones v. United States*,[284] the Supreme Court clarified that forfeiture of contraband is entirely remedial and is a "civil

276. *Id.* at 607-10.

277. *Id.* at 607-08 & n.4.

278. If the Court found the civil forfeiture proceedings to be so punitive that it must be considered criminal, then the Court would analyze the forfeiture. *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).

279. *Id.* at 618.

280. 21 U.S.C. §§ 881(a)(4), (a)(7) (1994).

281. *Austin*, 509 U.S. at 618.

282. *Id.* at 622.

283. *See supra* part VIII.A.1.

284. 409 U.S. 232, 237-38 (1972).

sanction." The Court stated that forfeiture of contraband and payment of a fixed sum

> prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions.[285]

Thus, it is clear that tribes may forfeit contraband and impose a fixed sum penalty for its possession.

Forfeiture of proceeds of a crime is also remedial and is a "civil" sanction. The Third, Fourth, Fifth, Sixth, Seventh, Eighth and D.C. Circuits have held that forfeiture of proceeds of a crime is remedial because it involves property that the claimant did not lawfully earn or own and property in which the claimant has no reasonable expectation of continued possession.[286] These opinions rely on the Fifth Circuit's decision in *United States v. Tilley*,[287] that interpreted *Austin* and distinguished forfeiture of instrumentalities, which are not necessarily proportional to the harm inflicted upon the government and society, and forfeiture of proceeds. Proceeds are, by their very nature, directly proportional to the "value" of (or injury inflicted by, as the case may be) the illegal act.[288] The Supreme Court appears to agree with this view.[289]

Forfeiture of instrumentalities of crime is more problematic and will require carefully drawn statutes. Tribal governments should base the forfeiture provisions on specific findings related to non-punitive reasons that necessitate them. Five legitimate, non-punitive reasons are: (1) to protect

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285. *Id.* at 237.

286. *See* Smith v. United States, 76 F.3d 879, 882-83 (7th Cir. 1996); United States v. $184,505.01 in United States Currency, 72 F.3d 1160, 1168-69 (3d Cir. 1995), *cert. filed*, 64 U.S.L.W. 3669 (Mar. 28, 1996) (No. 95-1575); United States v. Salinas, 65 F.3d 551, 554 (6th Cir. 1995); United States v. Wild, 47 F.3d 669, 674 n.11 (4th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994); SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994); United States v. Tilley, 18 F.3d 295, 300 (5th Cir.), *cert. denied*, 115 S. Ct. 573 (1994). *But see* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1221 (9th Cir. 1994) (holding that any civil forfeiture is punishment), *rev'd sub nom.* United States v. Ursery, 116 S. Ct. 2135 (1996), *and* United States v. 9844 S. Titan Court, 75 F.3d 1470 (10th Cir. 1996) (rejecting Fifth Circuit's reasoning in *Tilley* and adopting the Ninth Circuit's reasoning in *$405,089.23*).

287. 18 F.3d 295 (5th Cir. 1994).

288. *Id.* at 300.

289. *Ursery*, 116 S. Ct. at 2148-49 (reversing lower court's determination that all civil forfeitures are punishment and stating that "[t]o the extent that [forfeiture] applies to 'proceeds' of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts").

the character of the land; (2) to abate a nuisance;[290] (3) to encourage property owners to take measures to prevent their property from being used to commit or facilitate crime;[291] (4) to protect the health, safety, and welfare of the residents of the reservation; and (5) to provide remedy to injured party — for example, to reimburse the tribal government for the costs of law enforcement, detection, investigation, and prosecution of violations of the law, and for the costs of maintaining the reservation.

3. Federal Court Review of Tribal Forfeiture

Tribal courts are not subject to the United States Constitution, except as they are expressly made so by the Constitution (i.e., the Commerce Clause) or an act of Congress.[292] Tribal forfeiture actions would be subject to the ICRA, but tribal courts would apply the act, and federal courts would not have the power to effect a substantive review of the proceeding. "That means that tribal courts are the sole arbiters of their own governmental actions when 'mere' property rights of non-Indians are involved."[293] Federal court review would consist solely of a review of tribal jurisdiction. This limitation on the power of federal courts may tempt the courts to cite *Austin* and find that tribal forfeiture is "inconsistent" with Indian tribes' status. Because forfeiture is quasi-criminal, federal courts could find that civil forfeiture proceedings are "criminal" for Indian law, but "civil" for "Anglo-American" law.

Any such decision by a federal court would treat Indians as less than full citizens, and would be evidence that the federal courts' concern with "protecting" citizens from inadequacies of tribal courts is limited to protecting *non-Indian citizens*. In *Martinez v. Santa Clara Pueblo*,[294] the Supreme Court restricted the jurisdiction of federal courts reviewing alleged ICRA violations to habeas corpus cases. The Court chose to affirm tribal sovereignty in Santa Clara Pueblo even when the affirmation "ha[d] the effect of denying American citizens [in this case Indians] the equal protection of the laws."[295] The Court, "realizing that the ICRA incor-

290. *Ursery*, 116 S. Ct. at 2148 (citing Bennis v. Michigan, 116 S. Ct. 994 (1996) (forfeiture of car designed to abate a nuisance — namely, prostitution — thus it was remedial) and United States v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990) (forfeiting apartment building used to sell crack cocaine)).

291. *Id.*

292. Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959).

293. Bowen, *supra* note 87, at 651; COHEN 1982 ED., *supra* note 87, at 668 (stating that federal court review under the Indian Civil Rights Act is limited to entertaining petitions for writs of habeas corpus)).

294. 436 U.S. 49 (1978).

295. Christina D. Ferguson, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson On Tribal Sovereignty*, 46 ARK. L. REV. 275, 299 (1993).

porated two distinct and often competing congressional purposes of protecting individual Indians from unjust actions of tribal government and promoting Indian self-government, decided that the latter must prevail."[296] Federal courts should follow the Supreme Court's lead in *Santa Clara Pueblo* and uphold tribal jurisdiction over non-Indians in forfeiture proceedings. Failure to do so would offer greater protection to non-Indians than to Indians. It also would countermand the choice that the Supreme Court made in *Santa Clara Pueblo* and congressional policy as expressed in the Indian Tribal Justice Act.

B. The ICRA and Due Process Concerns

The Bill of Rights does not apply to Indian tribes, but the ICRA does.[297] Congress has ensured that many of the provisions of the Bill of Rights will apply to proceedings in tribal courts, even if they are not reviewable by federal courts, through the enactment of the ICRA.[298] *Austin* raises the possibility that some protections of the ICRA may apply to tribal forfeiture proceedings.

In property disputes, the tribal court applies the ICRA. The language of the provisions in the ICRA does not mirror exactly the language of the Bill of Rights and the Act is not conterminous with the Bill of Rights.[299] The ICRA, therefore, applies to tribal courts differently than the Bill of Rights applies to the states and the federal government.[300] The provisions of the ICRA may apply less restrictively than similarly worded provisions of the Constitution. This result would be consistent with the federal government's concurrent policies of encouraging the development of tribal courts and allowing the tribes to determine what self-government means to them.

Courts must recognize an Indian tribe's heritage and customs and its method of self-government when analyzing the tribe's actions under the ICRA.[301] As well as drawing on their unique tribal values in their legislative

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296. KICKINGBIRD ET AL., *supra* note 158, at 11.

297. Oliphant v. United States, 435 U.S. 191, 194 n.3 (1978) (citing Talton v. Mayes, 163 U.S. 376 (1896)).

298. 25 U.S.C. § 1302 (1994).

299. *Oliphant*, 435 U.S. at 194; Lohnes v. Cloud, 366 F. Supp. 619 (D.C.N.D. 1973); GETCHES ET AL., *supra* note 103, at 501.

300. *See* Lohnes v. Cloud, 366 F. Supp. 620 (1973); *see also* Crowe v. Eastern Band of Cherokees, 506 F.2d 1231, 1236 (4th Cir. 1974) ("[T]he object of the Indian Civil Rights Act was to protect the individual members from arbitrary tribal Action, but it was not intended that historic sovereignty of a tribe should be abolished.").

301. Santa Clara v. Martinez, 436 U.S. 49 (1978) (stating that a court must consider the laws, customs, and values of the tribe when interpreting the ICRA and that the interpretation is to be made in a tribal justice forum); Tom v. Sutton, 533 F.2d 1011, 1105 n.5 (9th Cir. 1976) ("[T]he courts have been careful to construe the terms 'due process' and 'equal protection' as used in the Indian Bill of Rights with due regard for the historical, governmental, and cultural values of an Indian tribe.").

and judicial judgments, the law developed in tribal legislatures and trial courts may also differ from federal law, by virtue of hindsight. Tribes may learn from the mistakes of those who have gone before them. In this manner, tribes may offer non-Indian justice systems a chance to learn from the choices the tribal justice systems make.[302]

This different and presumably deferential analysis of Bill of Rights-like ICRA provisions may raise a new set of problems, such as what constitutes due process under the ICRA? Does the analysis of tribal actions begin with or even include the historical "American legal history,"[303] or does it consist solely of tribal notions of due process? Are there minimum requirements that any "sovereign" must meet?

In response to the last question, there is arguably a long-established "rule" requiring *independent* judicial review that might limit tribal forfeiture. In *Tumey v. Ohio*,[304] the Supreme Court held that a denial of due process occurred when the state of Ohio required a criminal defendant to appear before "a court the judge of which ha[d] a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[305]

Tumey was arrested and charged with unlawfully possessing intoxicating liquor. The State's Prohibition Act provided for trial by mayor of the village. The Village's ordinances provided that fines would be assessed *in the event of conviction*, and that the Mayor would receive a portion of these fines "as his fees and costs, in addition to his regular salary."[306] The Supreme Court held that this system denied the defendant due process of law.

The federal forfeiture system provides that property is forfeited to the government. One might argue that a judge sitting in a forfeiture case has a pecuniary interest in the matter. It has been held, however, that forfeiture proceedings in the abstract do not violate due process.[307]

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302. Edward Halbach, Jr., member of the steering committee of the American Indian Lawyer Training Program's Tribal Justice Center Project, testified at Investigative Hearings on the Administration of Justice in Indian Country:

> It's a rather unique opportunity at this date in history to write on a relatively clean slate and yet to be able to study the experience of others-to examine the surrounding state and federal legal systems and their experience, their inadequacies, even some successes, and try to take the best and leave what did not work.

JUSTICE IN INDIAN COUNTRY, *supra* note 9, at 127.

303. One possibility is that historical English and American legal standards may apply in forfeiture cases because the tribe is in effect adopting an Anglo-American institution. *See* White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

304. 273 U.S. 510 (1926).

305. *Id.* at 523.

306. *Id.* at 522. The total amount of fines collected by the village court during a seven month period for violation of the prohibition law was "upwards of $20,000" and the Mayor received $1796.50. *Id.* at 522-23.

307. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Although forfeiture does not violate due process, tribal forfeiture may face a different challenge. Many tribes do not have a constitutional provision mandating separation of powers,[308] and tribal judges acknowledge that the absence of a separation of powers hurts the reputation of their courts.[309] Federal courts may believe that tribal courts are not sufficiently independent and distinguishable from tribal police and the tribal legislature. This may lead the federal courts to the finding that forfeiture is inconsistent with Indian tribes' status. Implicit in *Tumey* is the notion that a tripartite system of government requires that a judge may not be a part of the executive branch that reaps the benefits of forfeiture.[310] This is an important concern in forfeiture actions where the tribe, its members, and the tribal court may stand to gain directly a great deal from the forfeiture. Tribal forfeiture is only appropriate in those tribes that have adopted procedures to guarantee a separation of powers. Modelling tribal forfeiture after federal forfeiture insures that tribal judges are impartial in the same manner that federal judges are impartial in forfeiture actions.

C. Are the Federal Courts Too Skeptical or Too Prejudiced?

The Supreme Court considers private property rights to be extremely important and the Court's recent decisions — *Austin*, for example — have attempted to rein in the federal government's use of forfeiture law.[311] *Austin* may signal a retreat from the extensive use of the legal fictions underlying in rem forfeiture law. *Austin* may also harken a shift in conventional wisdom that state forfeiture laws and tribal forfeiture laws will be treated the same as federal forfeiture laws. In addition, while the Court has shown little sympathy for the rights of accused criminals, the Court may give less deference to a tribal accusation. The politics of the Supreme Court may mean that the prospects are

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308. PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, 1984 REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES pt. 1, at 29 (1984) ("[T]he failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts weakening their independence, and raising doubts about fairness and the role of law."), *quoted in* Bradley B. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. PUGET SOUND L. REV. 211, 213 n.9 (1991); SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 9 (1978).

309. JUSTICE IN INDIAN COUNTRY, *supra* note 9, at 127 (testimony at Investigative Hearings on the Administration of Justice in Indian Country). Carol Redcherries, Chief Judge of the Northern Cheyenne Judicial System, acknowledged that when a tribal council has the power to overrule the tribal judges, this pressure may affect the judge's decision. *Id.*

310. Congress has not seen fit to legislate separation of powers as a general prerequisite to expanded roles for tribal courts. *See* H.R No. 205, 103d Cong., 1st Sess. 15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2425, 2436 ("The Committee intends this section to provide clear direction to the Administration that this Act shall not serve as authority to impose standards upon any tribal justice system. Nor does the Committee intend this legislation to serve as a mandate for separation of powers for any tribal government.").

311. *See* Austin v. United States, 509 U.S. 602 (1993); Alexander v. United States, 509 U.S. 544 (1993).

dim of establishing forfeiture as a viable and effective method of law enforcement.

The politics of the Court may also be bolstered by legitimate concerns regarding the capacity of Indian tribes to administer forfeiture programs fairly, and concerns regarding the capacity of the Indian tribes to muster the resources to administer forfeiture programs at all. The fear that the Court expressed in *Oliphant* was not about the design of tribal criminal laws, so the fact that they would be modeled after federal laws might not satisfy the Court. The Court was concerned about the administration of tribal justice. As Judge Canby notes, the image was of a partisan and primitive system of justice. The Court suspects that tribal courts may discriminate against outsiders.

The present Supreme Court might share such doubts about tribal courts administering civil forfeiture laws. Any such judicial skepticism should not override reality and congressional policy. For instance, "a recent study by the American Indian Policy Review Commission emphasizes the fact that tribal justice systems are evolving institutions, becoming more and more sophisticated and are potentially capable of assuming total jurisdiction in Indian country. The study concluded that tribal court systems are as capable as non-Indian judicial systems in administering justice in Indian country.[312] In addition, Congress has acted to supply Indian tribes with the resources to develop tribal justice systems. The Indian Tribal Justice System Act authorizes more than $58 million per year for the years of 1994 through 2000.[313]

Conclusion

Congress encourages the development of tribal justice systems, and the Supreme Court has evidenced a willingness to allow tribal courts to prove themselves, under the watchful eye of the federal courts. Although Congress has extended the criminal jurisdiction of the federal courts to offenses committed by and against non-Indians, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."[314] In rem forfeitures are civil proceedings that offer tribes a practical and effective method of law enforcement. Tribes should enact and enforce civil forfeiture provisions on their reservations against both Indians and non-Indians.

Tribal court decisions are subject to review by the federal courts, but tribal courts have the first chance to determine the extent of their jurisdiction.[315] The Supreme Court recognizes that the issue of jurisdiction is open to debate and the congressional policy of encouraging self-government and self-determination

312. KICKINGBIRD ET AL., *supra* note 158, at 25 (footnote omitted).

313. 25 U.S.C. § 3621 (1994).

314. National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845, 854 (1985) (citing COHEN 1982 ED., *supra* note 87, at 253).

315. *Id.* at 856.

supports a requirement that a party seeking relief in federal court first must exhaust tribal court remedies.[316]

The enactment and enforcement of forfeiture provisions is a perfect opportunity for tribes to begin to expand the role of tribal legislatures and tribal courts. Forfeiture is a practical and effective method of law enforcement. It would fill a void in police powers, replenish the tribes' coffers, limit illegal activity, and it should satisfy the non-Indian courts' concerns because the forfeiture provisions and judicial scrutiny of them could be modelled after federal law. Tribal forfeiture merely replicates procedures used extensively by the federal government.

One commentator has written:

> The decision in National Farmers Union places a tremendous responsibility upon, and presents a tremendous opportunity for, tribal courts and those who litigate disputes before these vital institutions of Indian self-government. Through the tools of the adversary process, relevant statutes, treaties, Executive Branch policy, and judicial decisions must be presented to tribal court as they decide in the first instance what tribal sovereignty means for their particular tribe's self-governing vision. The adequacy and thoroughness of the relevant record and judicial reasoning upon that record at the tribal court level will likely have a determinative impact on a non-Indian federal court's review of the initial tribal decision. Thus, Indian tribal courts have been presented with a unique wedge to drive home an Indian vision of tribal sovereignty in United States society. If affirmed by federal courts, the vision and discourse of sovereignty articulated in the tribal court opinion will have the force of law in United States society. Of course, there is no guarantee that this vision articulated by tribal courts will always be affirmed.[317]

Forfeiture provisions offer a unique opportunity for Indian tribes to expand the Indian vision of tribal sovereignty by adopting the legal fictions that support an Anglo-American Institution for their own purposes.

Indian tribes should take advantage of this opportunity in a deliberate manner by enacting and enforcing in rem forfeiture legislation. A tribe considering such legislation should do all that it can to ensure that it heads off any challenges to its exercise of jurisdiction and proceeds accordingly. The following actions should prove helpful in ensuring that federal courts, who inevitably will be

316. *Id.* at 856-57.

317. Robert A. Williams, *The Discourses of Sovereignty in Indian Country*, INDIAN LAW SUPPORT CENTER REP., Sept. 1988, at 9 (vol. 11) (quoted in Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 362 (1989)).

called upon to review a tribe's assertion of jurisdiction, will approve tribal court jurisdiction over in rem forfeitures.

First, the tribal government should pass specific legislation authorizing in rem forfeiture. This legislation should authorize explicitly denominated civil proceedings, and should distinguish clearly this exercise of jurisdiction from an exercise of criminal jurisdiction. The tribe also should limit the legislation to in rem actions and should emphasize that it is an action against the *property* rather than the person. The legislation also should be tied closely to control of contraband rather than to criminal violations. The less the legislation smacks of punishment by another name, the better. For example, the legislation should not contain an "innocent owner" exception.[318] The tribe should require and should enforce proper notice provisions. The legislation also should afford claimants an opportunity to appeal the judgment of forfeiture to a tribal appellate court.

Furthermore, the tribe should hold hearings, should gather evidence, and should articulate specific findings regarding the need for law enforcement of this type. Where appropriate, the tribe should indicate that the legislation is necessary to address conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[319] The tribe also should acknowledge that the legislation is considered remedial action. For instance, the legislation might be necessary to preserve the character of the reservation by preventing the introduction of contraband or by abating a nuisance. Forfeiture proportional to the cost or value of illegal action would compensate the tribe for its law enforcement expenses.

The enforcement of the legislation should begin conservatively. Entry on reservation land should be monitored, and entry by non-Indians should be limited to cases in which the non-Indian consents to the tribe's exercise of civil jurisdiction over disputes arising on the reservation. The tribe should pursue forfeiture for events occurring on the reservation, in "closed" areas, and on tribal trust land. Initially, the tribe should establish jurisdiction over forfeiture of contraband and proceeds. Only after establishing this solid foundation for the exercise of jurisdiction should the tribe seek to forfeit instrumentalities.

Each tribe must decide on a vision of its own sovereignty. The development of federal Indian law has limited the avenues available to actualize these visions. In rem forfeiture is one avenue that is both appropriate and available for Indian tribes to pursue a "civil," but still highly effective method of law enforcement.

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318. *Cf.* Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (holding that Double jeopardy Clause did not apply to in rem forfeiture provision that did not contain "innocent owner" exemption) *with* Austin v. United States, 509 U.S. 602, 619 (1993) (holding that Excessive Fines Clause of Eighth Amendment applies to forfeiture of property pursuant to statute containing "innocent owner" exemption and noting that "[t]hese exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less").

319. Montana v. United States, 450 U.S. 544, 566 (1981).